Liberty Technology Resources Sdn Bhd v Suruhanjaya Syarikat Malaysia (SSM)

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-588–11 OF 2020
ONG CHEE KWAN J
19 JUNE 2023

Contract — Contractual payments — Claim for — Defendant appointed plaintiff as one of vendors for organisation transformation exercise — Delay in project — Defendant terminated plaintiff's work — Plaintiff claimed for outstanding fees — Defendant counterclaimed for full refund and liquidated ascertained damages — Whether defendant was contractually obliged to pay plaintiff for software acquired for performance of project — Whether defendant was responsible for delay of project — Whether plaintiff's claim ought to be allowed — Whether agreement had been lawfully terminated — Whether defendant could claim for refund and liquidated ascertained damages

In 2016, the defendant ('SSM') underwent an organisational transformation exercise to redesign its existing business management, finance, human resources and organisation systems into a re-engineered information technology infrastructure framework. SSM appointed the plaintiff ('Liberty') as one the vendors for the organisation transformation exercise. The enterprise resource planning ('ERP') system was intended to comprise of nine distinct but inter-related modules which corresponded to SSM's six existing systems, service and functions. SSM awarded Liberty the project for the ERP system via the issuance of a letter of award ('the project') and was later formalised through the execution of the ERP agreement. The operative deadline for Liberty to complete the project was 31 October 2017 ('the original completion date'). A supplemental agreement ('SA No 1') was executed in which SSM agreed to extend the original completion date to 31 March 2018 ('the first extended completion date'). Liberty then requested for a total of three extension of time ('the first, second and third EOT request') in which SSM acceded to. This was eventually formalised into the second, third and fourth supplemental agreement ('SA No 2, No 3 and No 4') whereby SSM agreed to extend the first extended completion date to 30 September 2018 ('the second extended completion date'), 31 March 2019 ('the third extended completion date') and 31 August 2019 ('the fourth extended completion date') respectively. However, the project was not completed by the fourth extended completion date. Liberty issued a fourth EOT request but was rejected by SSM. SSM issued to Liberty a notice of default and gave Liberty 30 days to remedy its breach. Given Liberty's failure to remedy its breach, SSM issued a notice of termination terminating the ERP agreement. Hence, this action. Liberty's principle claims

against SSM were for contractual payments in the sum of RM19,872,979.19 broken down as follows: (a) RM17,633,549.19 being the sum owing to Applied Business Systems Sdn Bhd for the Oracle On-Premise Licenses and Oracle Cloud Subscription Fees which was purchased and/or subscribed by the plaintiff on behalf of the defendant ('Oracle fee'); (b) RM507,680 for Infrastructure Readiness and Standard Module Installation; (c) RM204,750 for eBSK Solution Configuration; and (d) RM1,527,000 for pre-user acceptance testing ('Pre-UAT'). On the other hand, SSM had counterclaimed against Liberty for, among others, the following: (i) a declaration that the ERP agreement had been lawfully terminated; (ii) damages to be assessed for Liberty's breaches of its express and implied representations and warranties under the ERP agreement; and (iii) a sum of RM14,195,178.73 broken down as follows: (A) a refund of RM12,228,365.80 paid by SSM to Liberty for Liberty's failure to deliver a workable ERP system pursuant to cl 25.3(b)(i); and (B) liquidated ascertained damages ('LAD') in the amount of RM1,966,812.94.

Held, dismissing the claim:

(1) Liberty had not even demonstrated nor clarified how it arrived at a figure of RM17,633,549.19, in particular, what components made up that figure, or even how such components corresponded to the items outlined in Schedule E to the ERP agreement. Furthermore, the claim for RM17,633,549.19 included license fees extending after the termination of the ERP agreement. Putting aside the fact that Liberty had failed to demonstrate any contractual entitlement to such payments, Liberty also had not shown it had actually incurred such fees. SSM simply had no obligation to reimburse Liberty for the Oracle fee as such costs for third party software was to be borne by Liberty. SSM's payment obligations in respect of the third-party software was confined to payment of the licence fees based on Schedule E of the ERP agreement and nothing more. The purported 'admission' by DW1 that SSM was obliged to make the payment for the Oracle fee had been taken out of context. The 'admission' to pay was premised on SSM agreeing to accept Liberty's proposal and Liberty delivering a completed ERP system to SSM which was not the case. Therefore, Liberty's claim for the sum of RM17,633,549.19 being the Oracle software license fees was wholly without any merits (see paras 144, 146–147, 150–151 & 153–154).

(2) There was no delay analysis whatsoever placed by Liberty before the court to demonstrate and identify the causes which had actually delayed the completion date of the ERP agreement or the extent and nature of these delays. Given the dearth of the relevant documentary evidence enabling the construction of a critical pathway analysis and/or any identifiable documents to support the notion that SSM was responsible for the delays, Liberty had effectively failed to prove that SSM had committed

acts of prevention delaying the completion of the project. Liberty remained in breach of cl 6.2 of the ERP agreement for failing to achieve completion of the ERP system on or before the fourth and final extended completion date (see paras 158, 169 & 172).

(3) Liberty had not prepared and submitted a checklist for all outstanding tests necessary to verify completion of the Infrastructure Readiness and Standard Module Installation or any check list to SSM. As such, merely because SSM had 'signed off' the 'infrastructure readiness', the payment for the Infrastructure Readiness and Standard Module Installation was not due at the time of termination of the project by SSM. Similarly, the eBSK Solution Configuration had remained incomplete. Moreover, there was no provision in the ERP agreement which allowed Liberty to make ad hoc claims ie the claim under the Pre-UAT module for such portions of the Pre-UAT tasks that had been signed off by SSM. There was no evidence that in respect of the Pre-UAT tasks, such partial claims were agreed to by SSM. Thus, Liberty's claims for the 'Infrastructure Readiness and Standard Module Installation', 'eBSK Solution Configuration' and the Pre-UAT amount were rejected (see paras 193–194 & 198–200).

(4) Since the delay was not caused by SSM but was attributed to Liberty, the termination by SSM of the ERP agreement was lawful. There was no suggestion by Liberty that SSM's claim for the refund of all monies paid to Liberty under cl 25.3(b)(i) of the ERP agreement was not contractually agreed upon as a consequence of a lawful termination of the ERP agreement. As regards the 'inconsistency' in its notice of termination, it was SSM's position that it had in fact made the election to seek the refund and for Liberty to remove all its works on the ERP solution from its premises at the commencement of this action. There was therefore no question of any unjust enrichment derived by SSM in seeking for the refund. Further, there was nothing in this case that would make it unconscionable or oppressive for the court to compel the parties to adhere to what they had contractually agreed. Liberty's contention that 'a total of 3 extensions of time were granted by SSM for Liberty to complete the ERP Project' served only to reinforce the position that parties had always intended for time to remain of the essence. Accordingly, the contention that time was not of the essence in the ERP agreement was rejected (see paras 211, 229, 231–232, 238 & 244–245).

(5) The plain and obvious language in SSM's letter that acceded to Liberty's request for the second extension of time and further acceded that LAD would only be imposed against Liberty starting from the period of the third EOT simply stipulated that SSM was entitled to impose LAD from the third extended completion date if the project was not completed by 31 March 2019. It said absolutely nothing about SSM foregoing, waiving

or relinquishing its rights to recover LAD already accrued between 1 October 2018 to 31 March 2018 under SA No 3. Accordingly, there was simply no merit to Liberty's contention that SSM had waived its right to recover the RM797,238.21 accrued between 1 October 2018 to 31 March 2019 under SA No 3. As regards the LAD for the period from 1 September 2019 and 23 December 2019 for the sum of RM499,368.99, SSM had clarified that the stated period in SSM's defence and counterclaim was a typographical error. Liberty had not been prejudiced in any way by the typographical error. Lastly, there was no legal authority put forward by Liberty to support its contention that SSM could only recover LAD or a refund, but not both (see paras 253, 255–256, 258–259, 261 & 263).

[Bahasa Malaysia summary

Pada tahun 2016, defendan ('SSM') menjalani proses transformasi organisasi untuk mereka bentuk semula pengurusan perniagaan, kewangan, sumber manusia dan sistem organisasi sedia ada ke dalam rangka kerja infrastruktur teknologi maklumat yang direka bentuk semula. SSM melantik plaintif ('Liberty') sebagai salah satu vendor untuk pelaksanaan transformasi organisasi. Sistem perancangan sumber perusahaan ('ERP') bertujuan untuk terdiri daripada sembilan modul berbeza tetapi saling berkaitan yang sepadan dengan enam sistem, perkhidmatan dan fungsi sedia ada SSM. SSM menganugerahkan Liberty projek untuk sistem ERP melalui pengeluaran surat penganugerahan ('projek') dan kemudiannya diformalkan melalui pelaksanaan perjanjian ERP. Tarikh akhir operasi untuk Liberty menyiapkan projek itu ialah 31 Oktober 2017 ('tarikh siap asal'). Perjanjian tambahan ('SA No 1') telah dilaksanakan di mana SSM bersetuju untuk melanjutkan tarikh siap asal kepada 31 Mac 2018 ('tarikh siap lanjutan pertama'). Liberty kemudian meminta sejumlah tiga lanjutan masa ('permintaan EOT pertama, kedua dan ketiga') di mana SSM bersetuju. Ini akhirnya diformalkan ke dalam perjanjian tambahan kedua, ketiga dan keempat ('SA No 2, No 3 dan No 4') di mana SSM bersetuju untuk melanjutkan tarikh siap lanjutan pertama kepada 30 September 2018 ('tarikh siap lanjutan kedua'), 31 Mac 2019 ('tarikh siap lanjutan ketiga') dan 31 Ogos 2019 ('tarikh siap lanjutan keempat'). Walau bagaimanapun, projek itu tidak disiapkan pada tarikh siap lanjutan keempat. Liberty mengeluarkan permintaan EOT keempat tetapi ditolak oleh SSM. SSM mengeluarkan notis ingkar kepada Liberty dan memberi Liberty 30 hari untuk membetulkan pelanggarannya. Memandangkan kegagalan Liberty untuk membetulkan pelanggarannya, SSM mengeluarkan notis penamatan perjanjian ERP. Oleh itu, tindakan ini. Tuntutan utama Liberty terhadap SSM adalah untuk pembayaran kontrak dengan jumlah RM19,872,979.19 dipecahkan seperti berikut: (a) RM17,633,549.19 merupakan jumlah terhutang kepada Applied Business Systems Sdn Bhd untuk Lesen Premis Oracle dan Yuran Langganan Oracle Cloud yang telah dibeli dan/atau dilanggan oleh plaintif bagi pihak defendan ('yuran Oracle'); (b) RM507,680

untuk Kesediaan Infrastruktur dan Pemasangan Modul Standard; (c) RM204,750 untuk Konfigurasi Penyelesaian eBSK; dan (d) RM1,527,000 untuk ujian penerimaan prapengguna ('Pra-UAT'). Sebaliknya, SSM telah membuat tuntutan balas terhadap Liberty untuk, antara lain, perkara berikut: (i) pengisytiharan bahawa perjanjian ERP telah ditamatkan secara sah; (ii) ganti rugi yang akan dinilai untuk pelanggaran Liberty terhadap representasi dan warantinya yang nyata dan tersirat di bawah perjanjian ERP; dan (iii) sejumlah RM14,195,178.73 dipecahkan seperti berikut: (A) bayaran balik sebanyak RM12,228,365.80 yang dibayar oleh SSM kepada Liberty kerana kegagalan Liberty menyampaikan sistem ERP yang boleh dilaksanakan menurut klausa 25.3(b)(i); dan (B) ganti rugi pasti tertentu yang ditetapkan ('LAD') dalam jumlah RM1,966,812.94.

Diputuskan, menolak tuntutan:

(1) Liberty tidak menunjukkan atau menjelaskan bagaimana ia mencapai angka RM17,633,549.19, khususnya, komponen apa yang membentuk angka itu, atau malah bagaimana komponen tersebut sepadan dengan item yang digariskan dalam Jadual E kepada perjanjian ERP. Tambahan pula, tuntutan untuk RM17,633,549.19 termasuk yuran lesen yang dilanjutkan selepas penamatan perjanjian ERP. Mengetepikan fakta bahawa Liberty telah gagal menunjukkan sebarang hak berkontrak untuk pembayaran sedemikian, Liberty juga tidak menunjukkan bahawa ia sebenarnya telah menanggung yuran sedemikian. SSM tidak mempunyai kewajipan untuk membayar balik Liberty untuk yuran Oracle kerana kos sedemikian untuk perisian pihak ketiga akan ditanggung oleh Liberty. Kewajipan pembayaran SSM berkenaan dengan perisian pihak ketiga adalah terhad kepada pembayaran yuran lesen berdasarkan Jadual E perjanjian ERP dan tidak lebih. 'Pengakuan' yang dikatakan oleh DW1 bahawa SSM diwajibkan untuk membuat pembayaran untuk yuran Oracle telah diambil di luar konteks. 'Pengakuan' untuk membayar adalah berdasarkan SSM bersetuju menerima cadangan Liberty dan Liberty menyampaikan sistem ERP yang lengkap kepada SSM yang mana tidak berlaku. Oleh itu, tuntutan Liberty untuk jumlah RM17,633,549.19 sebagai yuran lesen perisian Oracle adalah tanpa sebarang merit (lihat perenggan 144, 146–147, 150–151 & 153–154).

(2) Tiada sebarang analisis kelewatan yang dibuat oleh Liberty di hadapan mahkamah untuk menunjukkan dan mengenal pasti punca yang sebenarnya telah melambatkan tarikh penyelesaian perjanjian ERP atau sejauh mana dan jenis kelewatan ini. Memandangkan kekurangan keterangan dokumentari yang berkaitan yang membolehkan pembinaan analisis laluan kritikal dan/atau mana-mana dokumen yang boleh dikenal pasti untuk menyokong tanggapan bahawa SSM bertanggungjawab ke atas kelewatan itu, Liberty gagal membuktikan

bahawa SSM telah melakukan tindakan pencegahan melambatkan penyiapan projek itu. Liberty kekal melanggar klausa 6.2 perjanjian ERP kerana gagal mencapai penyiapan sistem ERP pada atau sebelum tarikh penyiapan lanjutan keempat dan terakhir (lihat perenggan 158, 169 & 172).

(3) Liberty tidak menyediakan dan menyerahkan senarai semak untuk semua ujian tertunggak yang diperlukan untuk mengesahkan siapnya Kesediaan Infrastruktur dan Pemasangan Modul Standard atau sebarang senarai semak kepada SSM. Oleh yang demikian, hanya kerana SSM telah 'menandatangani' 'kesediaan infrastruktur', bayaran bagi Kesediaan Infrastruktur dan Pemasangan Modul Standard tidak perlu dibayar pada masa penamatan projek oleh SSM. Begitu juga, Konfigurasi Penyelesaian eBSK kekal tidak lengkap. Selain itu, tiada peruntukan dalam perjanjian ERP yang membenarkan Liberty membuat tuntutan ad hoc iaitu tuntutan di bawah modul Pra-UAT untuk bahagian-bahagian tugas Pra-UAT sedemikian yang telah ditandatangani oleh SSM. Tiada bukti bahawa berhubung dengan tugas Pra-UAT, tuntutan separa tersebut telah dipersetujui oleh SSM. Oleh itu, tuntutan Liberty untuk jumlah 'Kesediaan Infrastruktur dan Pemasangan Modul Standard', 'Konfigurasi Penyelesaian eBSK' dan Pra-UAT telah ditolak (lihat perenggan 193–194 & 198–200).

(4) Memandangkan kelewatan itu bukan disebabkan oleh SSM tetapi dikaitkan dengan Liberty, penamatan perjanjian ERP oleh SSM adalah sah. Tiada cadangan oleh Liberty bahawa tuntutan SSM untuk pengembalian semua wang yang dibayar kepada Liberty di bawah klausa 25.3(b)(i) perjanjian ERP tidak dipersetujui secara kontrak sebagai akibat daripada penamatan perjanjian ERP yang sah. Berkenaan dengan 'percanggahan' dalam notis penamatannya, SSM berpendirian bahawa ia sebenarnya telah membuat pilihan untuk mendapatkan bayaran balik dan untuk Liberty mengeluarkan semua kerjanya mengenai penyelesaian ERP dari premisnya pada permulaan tindakan ini. Oleh itu, tidak timbul persoalan tentang sebarang pengayaan yang tidak adil yang diperolehi oleh SSM dalam mendapatkan bayaran balik. Tambahan pula, tiada apa-apa dalam kes ini yang akan menjadikan mahkamah tidak bertimbang rasa atau menindas untuk memaksa pihak-pihak untuk mematuhi apa yang telah dipersetujui secara kontrak. Pertikaian Liberty bahawa 'sebanyak 3 lanjutan masa telah diberikan oleh SSM untuk Liberty untuk menyiapkan Projek ERP' hanya untuk mengukuhkan kedudukan bahawa pihak-pihak sentiasa berniat agar masa adalah penting. Sehubungan itu, pertikaian bahawa masa adalah tidak penting dalam perjanjian ERP telah ditolak (lihat perenggan 211, 229, 231–232, 238 & 244–245).

(5) Bahasa yang jelas dan nyata dalam surat SSM yang menyetujui

permintaan Liberty untuk lanjutan masa kedua dan seterusnya bersetuju bahawa LAD hanya akan dikenakan terhadap Liberty bermula dari tempoh EOT ketiga hanya menetapkan bahawa SSM berhak untuk mengenakan LAD dari tarikh lanjutan penyiapan ketiga jika projek itu tidak disiapkan pada 31 Mac 2019. Ia sama sekali tidak menyatakan apa-apa tentang SSM sebelum ini, mengetepikan atau melepaskan haknya untuk mendapatkan LAD yang telah terakru antara 1 Oktober 2018 hingga 31 Mac 2018 di bawah SA No 3. Sehubungan itu, tiada merit kepada pendapat Liberty bahawa SSM telah mengetepikan haknya untuk mendapatkan semula RM797,238.21 yang terakru antara 1 Oktober 2018 hingga 31 Mac 2019 di bawah SA No 3. Berkenaan LAD bagi tempoh dari 1 September 2019 dan 23 Disember 2019 dengan jumlah RM499,368.99, SSM telah menjelaskan bahawa tempoh yang dinyatakan dalam pembelaan dan tuntutan balas SSM adalah kesilapan ejaan. Liberty tidak pernah diprejudis dalam apa cara sekalipun oleh kesilapan ejaan. Akhir sekali, tiada autoriti undang-undang yang dikemukakan oleh Liberty untuk menyokong pendapatnya bahawa SSM hanya boleh mendapatkan LAD atau bayaran balik, tetapi bukan kedua-duanya (lihat perenggan 253, 255–256, 258–259, 261 & 263).]

Cases referred to

Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd [2007] 5 MLJ 697, FC (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (distd)

Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd [2019] 6 MLJ 15, FC (refd)

Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor [2011] 6 MLJ 464, FC (refd)

Daya CMT Sdn Bhd v Yuk Tung Construction Sdn Bhd [2018] MLJU 871, HC (refd)

Diong Tieow Hong & Anor v Amalan Tepat Sdn Bhd [2008] 3 MLJ 411, HC (refd)

HSM Offshore BV v Aker Offshore Partner Ltd [2017] EWHC 2979 (TCC), QBD (refd)

Hind Construction Contractors v The State of Maharashtra 1979 AIR 720, SC (refd)

Ng Weng Sum v Lembah Beringin Sdn Bhd [2002] 7 MLJ 211, HC (not folld)

Ong Saut Mee & Ors v Gasing Meridian Sdn Bhd [2021] MLJU 138, HC (refd)

PB Malaysia Sdn Bhd v Samudra (M) Sdn Bhd [2009] 7 MLJ 681, HC (refd)

Pernas Construction Sdn Bhd v Sykt Rasabina Sdn Bhd [2004] MLJU 759, CA (refd)

Yuk Tung Construction Sdn Bhd v Daya CMT Sdn Bhd and another appeal [2020] MLJU 1084; [2020] 1 LNS 1314, CA (refd)

Legislation referred to

Contracts Act 1950 s 56, 56(1)

Goik Kenwayne (with Foong Kar Yee) (Dennis Nik & Wong) for the plaintiff.
Chong Boon Leong (with Bryan Wang Yung and Michelle Ng) (Rahmat Lim & Partners) for the defendant.

Ong Chee Kwan J:

INTRODUCTION

[1] This is a judgment after trial.

[2] The subject matter of the action relates to a development and implementation of an integrated information technology infrastructure to digitalise the defendant's services and operations. Unfortunately, there were issues relating to the adequacy of the works and the plaintiff's ability to complete the same.

[3] The defendant terminated the plaintiff's works under the contract. The plaintiff claimed for outstanding fees. The defendant in turn counterclaimed for full refund of the fees paid and for liquidated ascertained damages.

BACKGROUND FACTS

[4] Sometime in 2016, the defendant ('SSM') underwent an Organizational Transformation Exercise to redesign its existing business management, finance, human resources and organization systems into a re-engineered information technology infrastructure framework.

[5] SSM appointed the following vendors for this Organization Transformation Exercise:

(a) the plaintiff, Liberty Technology Resources Sdn Bhd ('Liberty'): tasked to develop the 'Enterprise Resource Planning' or ERP system, an infrastructure which primarily deals with SSM's finance and human resource matters;

(b) Formis Network Services Sdn Bhd ('Formis'): tasked to develop the other infrastructures known as the XBRL financial reporting platform and the Core digital registry;

(c) Heitech Padu Bhd ('Heitech'): tasked to develop the security infrastructure;

(d) HLA Integrated Sdn Bhd ('HLA Integrated'): tasked to develop the information technology infrastructure; and

(e) Mesiniaga Bhd ('Mesiniaga'): tasked to develop an integration platform known as the FUSE/Middleware where all other infrastructures of the Organisation Transformation Exercise such as the ERP, XBRL and Core can be integrated as one synchronised system and/or network.

[6] The Enterprise Resource Planning ('ERP') System was intended to comprise of nine distinct but inter-related modules which corresponded to SSM's six existing systems, service and functions as follows:

ERP System Module	SSM's Associated Systems and Services
Accounting and Finance	Financial Management System
Investment	
Human Capital	Human Resource Management System
Knowledge Management	Knowledge Management System
e-Learning	
Customer Relationship Management	Customer Relationship Management System
Building and Facilities Administrative and Assets	Administrative and Building Management System
Project Management Tool	Project Management System

Background to Liberty's business

[7] Prior to Liberty's appointment to undertake the ERP System, Liberty's business primarily involved mechanical and electrical services for companies within the oil and gas sector.

[8] In 2013, Liberty ventured into information technology ('IT') projects for oil and gas companies.

[9] Upon becoming aware of SSM's tender invitation, Liberty enlisted the advice and guidance of more established IT companies, namely, Oracle Corp ('Oracle') and Bristlecone Inc ('Bristlecone') to partner up in bidding for the ERP System.

[10] Liberty issued a tender response and a technical proposal both dated 26 July 2016 in response to SSM's tender invitation, representing, among other things, that its suggested solution was capable of fulfilling SSM's requirements.

[11] This was followed by a tender clarification between SSM and Liberty on 23 March 2017 where it was recorded, among other things, that:

(a) Liberty had presented three options for the deployment and hosting of the ERP System being:

(i) a full-cloud environment hosted and managed by Oracle;

(ii) a full on-premise solution with all applications and modules deployed within SSM's premises; and

(iii) a hybrid solution comprising of an on-premise environment storing SSM's financial and human resource data within SSM's premises and a cloud environment storing the remaining data.

(b) Liberty had enlisted the services of Bristlecone and Oracle as 'Developers' and 'Principal' respectively.

[12] SSM awarded Liberty the project for the ERP System via the issuance of a letter of award dated 30 March 2017 ('the project') accepting Liberty's tender submission. The letter of award was later formalised through the execution of the ERP agreement on 13 September 2017.

[13] Notably, Schedule F to the ERP agreement prescribed a sequential workflow for the project as follows:

(a) project kick-off;

(b) infrastructure planning;

(c) completion of user requirement studies ('URS');

(d) completion of module functional designs ('MFD');

(e) standard module installation;

(f) solution configuration;

(g) integration and data migration set up;

(h) conference room piloting ('CRP')/pre-user acceptance testing ('Pre-UAT');

(i) system testing and integration testing;

(j) data migration testing;

(k) training;

(l) user acceptance testing ('UAT') and sign off;

(m) completion of data migration; and

(n) go live and project closure.

[14] The operative deadline for Liberty to complete the project pursuant to cl 6.2 of the ERP agreement was 31 October 2017 ('original completion date'). A

[15] Pursuant to cl 19.2, the time is stated as of the essence in respect of the date Liberty had to complete the ERP System. B

PROJECT DELAYED — THE DISPUTES

April-May 2017: Project kick-off and issues with Hybrid Solution

[16] It is not in dispute that the project was delayed owing to an issue as to whether a Full Cloud Solution or a Hybrid Solution ought to be deployed. There is a disagreement as to who ought to be responsible for the delay. C

[17] Liberty contended that its tender submission for the ERP System which was premised on Full Cloud was accepted by SSM *in toto.* By reason of this, SSM cannot then point fingers at anyone for its own subsequent decision to change from Full Cloud to Hybrid. D

[18] The switch from Full Cloud to Hybrid required SSM to obtain confirmation and approval from the Procurement Committee A ('JPA'). The purchase and installation of software and licenses cannot be carried out before obtaining JPA approval. Also, infrastructure preparation would only begin upon JPA approval. E

[19] Since the JPA approval was only obtained on 14 August 2017, there was already a delay of more than four months from the kick-off date of the ERP project which was on 3 April 2017. F

[20] On the other hand, SSM asserted that the parties had agreed that the project would be deployed via a hybrid solution at the tender clarification meeting on 23 March 2017. In fact, Liberty had prepared the first draft of the project Charter on 10 April 2017 confirming that the ERP System would be 'designed as a hybrid architecture where some modules reside in the Oracle Cloud Solution and some modules reside in Oracle On-Premise Solution'. G H

[21] Notwithstanding the aforesaid, at the project 'kick-off' meeting on 13 April 2017, (the relevant excerpts set out below), SSM discovered that Liberty's deployment solution involved the storage of sensitive data in overseas servers located in Sydney, Australia. This deployment solution would potentially be in breach of data protection rules for government entities. As a result, Liberty was directed to evaluate the suitability of its Full Cloud solution: I

> 3.11 Pengerusi memaklumkan perkara ini tidak dinyatakan di dalam Request for proposal (RFP) sebelum ini.

A 3.12 Pengerusi juga memaklumkan bahawa Jabatan Akauntan Negara menyarankan agar sistem pengurusan kewangan dan sistem pegurusan sumber manusia tidak digalakkan berada *on cloud*. Sekiranya tiada pilihan, SSM perlu mendapatkan kelulusan dari Pejabat Ketua Pegawal Keselamatan Kerajaan Malaysia (CGSO).

B 3.13 Pengerusi gantian PWC meminta LTRSB mengkaji kedudukan dan isu keselamatan *data centre* (Oracle) yang terletak di Sydney, Australia dan meminta LTRSB menjelaskan perkara in di mesyuarat akan datang. LTRSB juga perlu mengemukakan kajian dan cadangan implementasi *Cloud* atau *Hybrid Solution* untuk SSM. Perubahan skop kerja ini perlu diluluskan oleh PSC sebelum ianya C boleh dilaksanakan.

[22] A circular from the Accountant General's Department dated 26 May 2017 ('AGD Circular') expressly prohibiting the storage of government data in overseas servers is stated as follows:

D

> ... perkara berikut perlu di ambil perhatian oleh agensi yang bercadang atau telah pun menggunakan sistem perakaunan dan kewangan berasaskan teknologi Cloud khusunya public cloud:
>
> i. Pusat Data/Server perlu berada di premis Kerajaan di dalam negara.

E

[23] Notwithstanding the aforesaid, Liberty nevertheless persisted in its proposal for SSM to adopt a full cloud solution through meetings held on 21 April 2017, 25 April 2017, 26 April 2017, 3 May 2017 and 22 May 2017.

F

[24] On 29 May 2017, Liberty once again insisted that SSM adopt a full-cloud environment instead of the agreed upon hybrid solution and warned SSM that it would have to incur costs of at least RM5m otherwise.

G **[25]** In light of the restriction imposed by the AGD Circular, SSM was constrained to reiterate its position that the ERP System must be deployed via the hybrid solution as originally agreed upon and instructed Liberty to 'meneruskan dengan solusi Hybrid ...'.

H **[26]** It is SSM's position that on an *ex gratia* basis, SSM acceded to Liberty's request for additional payment to develop the hybrid solution despite the fact that:

(a) Liberty had originally proposed and designed the deployment of the ERP System through a hybrid solution; and

I

(b) parties had already agreed upon the hybrid deployment solution as early as March 2017.

[27] This was later codified through the execution of the first supplemental

agreement dated 31 December 2017 ('SA No 1') in which SSM, on an *ex gratia* basis agreed to extend the original completion date of 31 October 2017 by five months to 31 March 2018 ('first extended completion date') and increased the contract price from RM29.8m to RM35,530,152 so that Liberty would be able to complete the project.

June 2017-March 2018: Delays with URS documentation, data migration works, middleware integration, changes in Liberty's implementation partners and unavailability of Oracle Software

[28] Another area of contention relates to the delay of the project which involved the signing off of the URS for the project.

[29] Just three months after the project 'kick-off' meeting on 13 April 2017, during a meeting on 12 July 2017, Liberty reported that the progress of the project had allegedly been delayed by 11%.

[30] At the PWC meeting on 16 August 2017, Liberty highlighted that a total of 24 URS were made and that the status of the 24 URS had been sent via weekly email to SSM since 14 July 2017.

[31] In item 3.1.3 of the meeting minutes, SSM informed that they were not able to sign the 24 URS because there were more documents and issues which needed to be prepared and resolved.

[32] Liberty raised that the said additional documents and issues were never mentioned by SSM at the previous PWC meeting on 12 July 2017. The above was only raised as late as 16 August 2017 although the status of URS had been sent via email to SSM on 14 July 2017.

[33] As a result, the URS signoffs had to be pushed back to 8 September 2017.

[34] Subsequently at the PWC meeting on 28 August 2017, Liberty presented the latest status on the URS and requested that the original 24 URS together with the two additional URS comprising the project costing and budget control be signed off by SSM.

[35] Instead of signing off the URS, SSM requested that Liberty develops a new e-BSK system and that the modules to be signed off by 8 September 2017. Consequently, the URS was increased to 35. Again, this was raised for the first time at the meeting.

A **[36]** At the PWC meeting on 14 September 2017, SSM was only agreeable to sign six out of 35 URS as the remaining 29 URS were in isolation and were not synchronised with other related modules within and outside the ERP system. As a result, the URS signoffs had to be further pushed back to 29 September 2017.

B

[37] In an attempt to resolve this issue, Liberty suggested the implementation of the service oriented architecture ('SOA') for the integration of modules within the ERP system. Without the SOA, there was a risk that the entire timeline of the ERP project would further be pushed back as they could C be further delay in the integration of modules.

[38] Notwithstanding this, SSM was not agreeable to use the SOA as SSM was of the view that they already have their own middleware ie FUSE, which is D being developed by another vendor named Mesiniaga.

[39] Subsequently at the PWC meeting on 3 October 2017, Liberty updated that SSM was supposed to sign off the URS by 29 September 2017 as resolved at the previous PWC meeting but this was not done. At this meeting, Liberty E brought to SSM's attention that there was already a delay of ten weeks.

[40] In any case, it is Liberty's case that as at the date the ERP agreement was terminated by SSM on 23 September 2019, the middleware which was to be developed by Mesiniaga was not ready and completed. Hence, integration F would not have been possible.

[41] It is Liberty's pleaded case that SSM has the duty to give timely response in respect of signoffs and other relevant feedbacks and inputs relating to the G ERP project. There exists a dependency on SSM in this regard.

[42] Despite acknowledging that there existed a dependency on SSM in the implementation of the ERP project, Liberty contended that SSM throughout the project has failed, refused and/or neglected to provide Liberty with the H necessary feedbacks, inputs and/or to revert with signoffs timely.

[43] On the other hand, SSM's position is that while Liberty reported that there had only been a delay of 11% as at 12 July 2017 due to the issues with the URS documentation (as revealed on 14 September 2017), beyond the I completion of the URS documentation, there remained a considerable number of project phases that had not yet been completed.

[44] At this point in time, namely 14 September 2017:

(a) there remained just two days for Liberty to complete the URS documentation; and

(b) there remained just 1.5 months until the original completion date of 31 October 2017.

[45] Under cl 10.1 of the ERP agreement, it is Liberty's contractual obligation to prepare the URS documentation for the purposes of gathering, analysing and identifying all functionalities, processes, workflows, migration and interfaces required by SSM's systems.

[46] In a subsequent meeting on 21 December 2017, approximately two months after the original completion date had lapsed and Liberty had failed to deliver a completed ERP System, Liberty reported that the URS documentation still remained incomplete resulting in consequential delays to the completion of the MFD documentation, system integration testing, key user training, UAT, data migration and final acceptance testing.

[47] During this meeting, SSM expressed concerns with the limited time available for Liberty to complete these activities by the first extended completion date of 31 March 2018.

[48] On 14 February 2018, Liberty reported that it had allegedly completed the URS documentation. This was approximately two months after which Liberty was contractually required to complete and deliver the URS documentation pursuant to the amended Implementation Schedule under SA No 1.

Delays from substitution of implementation partner (Bristlecone — FIT)

[49] Another cause to the delay of the project was the substitution of Liberty's implementation partners.

[50] On 10 January 2018, Liberty informed SSM that its appointed implementation partners who were tasked with preparing the MFD were having issues with procuring visas to enter Malaysia. Liberty had by this time substituted Bristlecone with Liberty's Work Teams, Fusion Infotech ('FIT'), without prior written approval from SSM as contractually required under cl 7.5.2 of the ERP agreement.

[51] Under the ERP agreement any change in Liberty's key personnel (which includes Liberty's implementation partners such as Bristlecone and FIT) can only be made with the prior written approval of SSM pursuant to cl 7.5.2.

[52] In this instance, not only has Liberty substituted Bristlecone with FIT without SSM's prior approval in breach of cl 7.5.2, Liberty took five months to inform SSM that there had been a change in personnel.

[53] Just five days after having completed the delayed URS documentation, Liberty informed SSM of two further delays on 21 February 2018:

(a) first, Liberty's implementation partner, Bristlecone, had departed in September 2017 (ie five months prior) and FIT had been transitioned into the project and were in the process of understanding the URS documentation prepared thus far;

(b) some of FIT's personnel were unavailable in November and December 2017 due to visa approval issues; and

(c) second, some Oracle Cloud software was unavailable from December 2017 to January 2018 causing the MFD sessions to be put on hold.

[54] At this point in time, Liberty reported the project as being delayed by 45%.

[55] On 22 March 2018, Liberty informed SSM that FIT had struggled to complete the MFDs due to FIT's frequent replacement of its own personnel every two weeks. An example of this occurred on 23 July 2018, where Liberty informed SSM that FIT had returned to India and would not return to Malaysia until the first week of August 2018, further delaying the MFD completion by two weeks.

Delays from integration issues with FUSE Middleware

[56] Pursuant to cl 10.5.1(b) of the ERP agreement, Liberty had agreed to the integration of the ERP System with SSM's existing systems. At the material time, SSM's systems employed a middleware known as FUSE to interface between each system.

[57] On 14 September 2017, however, Liberty proposed to replace the FUSE middleware with Oracle's own middleware, SOA, for the purposes of the ERP System. Liberty's proposal was rejected by SSM in this regard and SSM instructed Liberty to continue developing the ERP System using FUSE as the middleware for the ERP System.

[58] It took approximately two months later on 17 November 2017 for Liberty to inform SSM that it did not have any expertise or experience in integrating FUSE with an ERP system.

[59] To put this into perspective, the operative deadline for Liberty to complete integration works and testing pursuant to the amended Implementation Schedule under SA No 1 was 15 December 2017.

[60] Yet, on 21 December 2017, Liberty persisted again for SSM to adopt SOA as the middleware for the ERP System allegedly on the basis that there had been no 'success statement' from Oracle in integrating FUSE with an Oracle Cloud system. This was in spite of Liberty's express obligations under cl 10.5.1(b) of the ERP agreement and SSM's express instructions to proceed with FUSE as the middleware.

[61] In light of Liberty's persistence and admitted inexperience in integrating FUSE with ERP systems, SSM acceded on a good will basis to a compromised version of a SOA-FUSE middleware configuration, such SOA would be used to interface internally within the ERP System, while FUSE would be used to interface externally between the ERP System and SSM's other systems.

[62] During a meeting on 20 February 2018, Liberty informed SSM that the SOA-FUSE middleware compromise would have 'no impact' on the first extended completion date of 31 March 2018.

[63] This was clearly not the case as issues with Liberty's proposed SOA-FUSE configuration remained unresolved even as of August 2019.

The first EOT request

[64] On 21 December 2017, approximately two months after the original completion date had already lapsed, Liberty requested for an extension of time ('EOT') of six months and justified its request as follows:

> Faktor-faktor yang menyumbang kepada permohonan lanjutan tempoh projek adalah:-
>
> – Infrastructure requirement changes due to some technical limitations and governance;
>
> – Complexity of 8 e-BSK modules system development time and effort;
>
> – Complexity of integration approach;
>
> – Complexity of data migration approach; and
>
> – Phase rollout approach to mitigate the risk of Big Bang approach.

[65] SSM requested Liberty to write in formally to request for an EOT.

[66] On 15 February 2018, it took Liberty approximately two months from its verbal EOT application to formally write in on requesting an EOT ('first EOT request') as follows:

> ... In December 2017, Liberty Technology Resource Sdn Bhd (LTRSB) has informed SSM *due to the incompleteness of the URS documentation and Module Functional Design (MFD) activities)*, consequently it has caused delays to the subsequent project activities ...
>
> This letter highlights the contributing factors that have caused the time insufficiency and justifications of the extension of time to complete the project.
>
> 1. High Dependencies on Multiple Critical Items within the ERP Solution
> In the overall ERP solution, there will be dependencies on multiple critical items within the solution especially with legacy system. These dependencies are related to end to end flow (integrations) which can be complex. *To ensure ERP solution are properly integrated within SSM eco-system, we would require additional effort to comply*.
>
> 2. Transforming From a Manual to Digital System
> While this being a major transformation project there are many products for which SSM users need to go through a reliable and comfortable training program because of which the project success can be ensured and the provision of such time has been considered during the new project plan. User adoption and comfort with the system is crucial for being able to gauge the benefits of investment in the transformation.
>
> Based on the justifications given above, our proposed timeline revision summary is as the table below:

New Start	New Finish	New Go Live	Baseline Start	Baseline Finish	Baseline Go Live
No Change	Mon 31/12/18	Wed 2/1/19	Mon 3/4/2017	Sat 31/3/2018	Sun 1/4/2018

> ... *We appeal that this request for extension does not subject LTRSB to Liquidated Ascertained Damages (LAD) mentioned in the contract*. We are positively confident that the extension period will give us sufficient time to complete the remaining project activities ...

[67] Notably, Liberty has confirmed during the trial that:

(a) the first EOT request makes no express mention of SSM being responsible for any of the delays to the project thus far; and

(b) Liberty's first EOT request is made under cl 6.2(b) (and not cl 6.2(d)) of the ERP agreement, as confirmed by Liberty's appeal to SSM's not to exercise its contractual right to impose LAD in the last paragraph of the first EOT request.

[68] SSM then acceded to Liberty's first EOT request on an *ex gratia* basis and this was eventually formalised into the second supplemental agreement

dated 27 August 2018 ('SA No 2') whereby SSM agreed to extend the first extended completion date of 31 March 2018 to 30 September 2018 ('second extended completion date'). A

April 2018-September 2018: Delays with integration planning and works, Middleware Configuration, selection of HR Software, further replacement of implementation partner and incomplete MFD documentation B

[69] On 4 April 2018, Liberty informed SSM that it encountered difficulties in uploading SSM's payroll data onto the Oracle Fusion Performance product. C

[70] It took close to six months for Liberty to source for a replacement product as announced on 25 September 2018 where Liberty informed SSM that it would be replacing the Fusion Performance product with another product called Peoplesoft. D

[71] It is pertinent to note that it was Liberty who had proposed to subscribe to Fusion Performance in its tender response.

Delays from incomplete MFD documentation E

[72] On 3 May 2018, SSM informed Liberty that there were five items required within the ERP System, prescribed in the URS documentation, but which had no MFDs prepared for ('five critical issues'). F

[73] Liberty should have completed all MFD documentation by 30 March 2018 under the amended Implementation Schedule pursuant to SA No 2. However, Liberty had only completed 68% of the MFDs by 28 March 2018. G

[74] These five critical issues and their corresponding URS documentation, may be expressed as 'Kertas Dasar', 'Refund', 'Customised Budget Control', 'Knowledge Management & E-Learning' and 'Customer Contract Management'. H

Delays to integration planning

[75] On 23 July 2018, SSM identified several issues with Liberty's Integration Plan, most pertinently with the fact that its proposed plan did not account for integration between the ERP System and external applications. I

[76] Pursuant to cll 8.1(g) and 10.5.1(b) of the ERP agreement, Liberty had agreed to the integration of the ERP System with external applications.

[77] Approximately one month later on 17 August 2018, Liberty informed SSM that the integration planning works could not be completed due to the fact that FIT had left and returned to India.

[78] To make matters worse, FIT completely abandoned the project as reported by Liberty on 5 September 2018 causing further delays to the completion of the integration planning works.

Delays from further replacement of implementation partner (FIT-TSSB) and re-assessment of URS, MFD and COA documentation

[79] On 14 September 2018, Liberty informed SSM that no replacement had yet been found for FIT which had abruptly abandoned the project due to internal issues within the company.

[80] More than five weeks after FIT had returned to India, Liberty introduced to SSM another replacement implementation partner on 26 September 2018, TransSys Solutions Sdn Bhd ('TSSB') who had been brought on board the project to undertake 'kerja-kerja project rescue'.

[81] As part of the 'rescue works', TSSB informed parties that it would need to conduct a design validation process to re-assess all previous workflows and processes conducted by FIT in the URS and MFD documentation.

[82] Additionally, TSSB informed SSM that the format of the chart of accounts ('COA') documentation (previously submitted by SSM on 6 July 2018) would need to be re-worked in its entirety.

[83] This was despite the fact that the COA format had already been agreed upon between SSM and Liberty as formalised in the corresponding MFD for the COA as early as 30 April 2018.

[84] It is crucial to note that, at this point in time, the second extended project completion date of 30 September 2018 pursuant to SA No 2 was only around two weeks away and yet Liberty's second replacement implementation partner was only now beginning to review the URS and MFD documentation.

[85] Liberty was clearly in no position to complete the remainder of the project phases within those two weeks.

The second EOT request

[86] In light of the above, Liberty subsequently made a further EOT request through its letter(s) dated 30 August 2018 and 14 September 2018 ('second

EOT request'), the relevant excerpts of which are outlined as follows:

> 1. Justifikasi permohonan lanjutan masa
>
> Merujuk kepada pelan projek asal (baseline) dan sebenar (actual) yang dibentangkan di dalam PWC ke-21 bertarikh 5 September 2018, terdapat varian sebanyak 22% *Faktor ketiadaan pelaksana Oracle (Fusion Infotech Sdn. Bhd., FIT) yang telah diberi mandate bagi kerja-kerja implementasi sehingga fasa penerimaan sistem Enterprise Resource Planning (ERP) yang menyumbang besar kepada kelewatan tersebut.* Ini disebabkan oleh masalah dalaman syarikat berkenaan yang menyebabkan kesemua consultant tempatan mengambil keputusan keluar dari syarikat FIT secara serentak. Penemuan Open Items dan Gap semasa sesi Module Functional Design (MFD) dan Integration Planning Documentation (IPD) juga telah dikenalpasti sebagai factor yang menyumbang kepada kelewatan dan pertambahan masa untuk projek ini ...

[87] Notably, Liberty has confirmed during the trial that:

(a) the second EOT request makes no express mention of SSM being responsible for any of the delays to the project thus far; and

(b) Liberty's second EOT request is made under cl 6.2(b) (and not cl 6.2(d)) of the ERP agreement, as confirmed by Liberty's appeal to SSM's not to exercise its contractual right to impose LAD in the last paragraph of the first EOT request.

[88] On an *ex gratia* basis, SSM once again approved Liberty's EOT request through its letter dated 26 November 2018.

[89] This would later be formalised through the third supplemental agreement dated 11 April 2019 ('SA No 3') which, among others:

(a) extended the second extended completion date of 30 September 2018 to 31 March 2019 ('third extended completion date'); and

(b) expressly provided that SSM would have the right to impose LAD under cl 20 of the ERP agreement (without affecting any other rights under the EPR Agreement) from 1 October 2018 onwards (ie from the second extended completion date).

October 2018-August 2019: Delays with integration works and data migration planning activities

[90] On 19 October 2018, parties agreed that a new technical document, called the AN100, would be produced to identify all integration points involved in the ERP System which needed to be completed by Liberty.

[91] On 14 January 2019, Liberty finalised and issued the AN100 which identified 111 integration points.

[92] On 13 May 2019, during a Pre-UAT criteria acceptance meeting:

(a) Liberty informed SSM that *at least* 21 (of the 111) AN100 integration points would be tested during the Pre-UAT session;

(b) SSM proposed that test scripts be prepared for the integration points during the Pre-UAT session; and

(c) Liberty agreed to this proposal.

[93] It is Liberty's position that it is not obligated to provide any integration points for testing at the Pre-UAT stage. The 21 integration points to be tested at the Pre-UAT stage was already over and above Liberty's scope of services under the ERP agreement and was in fact done as matter of goodwill.

[94] Liberty pointed to Schedule F of the ERP agreement where Liberty's scope of service at the Pre-UAT stage is merely to provide 'briefing sessions to users on the configured modules prior to UAT'.

[95] At the subsequent PWC meeting on 27 May 2019, SSM suggested to increase the integration points to be tested at the Pre-UAT stage from 21 to 111 points.

[96] At the same meeting, Liberty already placed on record its objection for the increase in the integration points. Liberty maintained that the 111 integration points would only be implemented during the UAT session later.

[97] At the next PWC meeting on 24 June 2019, Liberty again put forward its position that it was not agreeable for all the 111 integration points to be tested and completed at the Pre-UAT stage.

[98] Liberty *vide* its letter dated 24 July 2019 *ad nauseam* maintained that only 21 integration points ought to be tested at the Pre-UAT stage, and further sought SSM's consideration and confirmation pertaining to this matter.

[99] In view that no response was forthcoming from SSM, Liberty on 21 August 2019 issued another letter to inform SSM of the following:

(a) placed on record that there was still no response from SSM on Liberty's letter dated 24 July 2019 as aforesaid;

(b) the Pre-UAT session had been completed on 26 July 2019;

(c) SSM was required to sign the Pre-UAT test scripts and return the same, together with feedbacks, to Liberty;

(d) as at 21 August 2019, there are still unreturned test scripts by SSM; and

(e) vide the same letter, Liberty reminded SSM to finalise and sign the remaining test scripts as aforementioned, and to return the same to Liberty.

[100] On 2 October 2019, SSM confirmed with Liberty that the integration points to be tested at the Pre-UAT stage is 111 points. Liberty contended that there was a delay of five months in confirming with Liberty the exact points to be tested.

[101] SSM has a different position on the integration points. In the first place, SSM stated that during the 13 May 2019 meeting, there had never been any agreement between the parties to reduce the testing of all 111 integration points to merely testing 21 integration points. That being the case, Liberty remained obliged to complete the testing of all 111 integration points pursuant to its obligation under, among others, cll 1.1(kk), 8.1(g), 10.3(a) and 10.5.1 of the ERP agreement.

[102] On 24 June 2019, parties agreed that the testing of all 111 integration points to be completed would stand as the Pre-UAT results. This was confirmed again in a subsequent meeting on 25 July 2019.

[103] As at 25 July 2019, it was clear that Liberty was unable to complete the testing of all 111 integration points by 5 August 2019, as contractually required under SA No 4 (as defined below).

[104] This is fortified by the fact that the progress of conducting these Pre-UAT sessions had been delayed due to, among others, the unavailability of Liberty's own implementation partners.

[105] In fact, by 28 January 2018, Liberty admitted that it had only managed to complete testing 60 of the 111 integration points required.

Delays with data migration planning activities

[106] On 29 January 2019, Liberty wrote to SSM to request for SSM's assistance in facilitating data migration planning works which included data

extraction and cleansing through data migration workshops.

[107] For context, at this point in time, all data migration planning works ought to have been completed by 18 January 2019 pursuant to the amended implementation Schedule under SA No 3. As such, Liberty not only failed to complete the data migration planning works on time, but also belatedly requested SSM's assistance after the deadline for completing data migration planning works had lapsed.

[108] Notwithstanding, SSM on an *ex gratia* basis assisted Liberty in carrying out these works at SSM's own cost.

The third EOT request

[109] Liberty issued a further EOT request on 29 January 2019 ('third EOT request') citing the following:

> ... setelah selesai Design Validation Phase, kami menemui proses kerja yang telah dikenalpasti dan didokumenkan ke dalam URS dan MFD yang telah ditandatangani memerlukan beberapa rombakan bagi menambahbaik proses kerja tersebut. Pihak LTRSB dan TranSys perlu melaksanakan perkara tersebut bagi memastikan kesempurnaan dan kebolehgunaan system ERP yang akan diserahkan kepada SSM kelak ...

[110] Notably, Liberty has confirmed during the trial proceedings that:

(a) the third EOT request makes no express mention of SSM being responsible for any of the delays to the project thus far; and

(b) Liberty's third EOT request is made under cl 6.2(b) (and not cl 6.2(d)) of the ERP Agreement, as confirmed by Liberty's appeal to SSM's not to exercise its contractual right to impose LAD in the last paragraph of the first EOT request.

[111] On an *ex gratia* basis, SSM approved the third EOT request which was eventually formalised into the supplemental agreement dated 5 September 2019 ('SA No 4') which captured, among others, the following:

(a) the third extended completion date of 31 March 2019 was extended to 31 August 2019 ('fourth extended completion date'); and

(b) Liberty agreed that it would pay the LAD to be accrued from 1 April 2019 to 31 August 2019 ie the LAD that would accrue between the third extended completion date and the fourth extended completion date.

August 2019-December 2019: Delays with Pre-UAT, COA, data migration, CTI and FUSE Middleware integration, default and termination

[112] On 9 August 2019, just a matter of weeks before the fourth extended completion date, Liberty wrote to SSM purporting numerous difficulties in completing the following items for the ERP System:

(a) CRP/Pre-UAT testing;

(b) COA and Data Configuration Template;

(c) Data Migration;

(d) Computer Telephone Integration ('CTI'); and

(e) Integration to FUSE as a middleware.

[113] On 21 August 2019, Liberty wrote to SSM purporting further delays in respect of the Pre-UAT testing and alleged that there had been no agreement between parties as to how many integration points were to be tested during the Pre-UAT session.

[114] Liberty issued a further letter on 21 August 2019, demanding to be paid a sum of RM15,881,907 for Oracle software license fees.

[115] In this regard, cl 14.2(a) of the ERP agreement expressly provides that any payment due to Liberty under the ERP agreement would be paid upon completion of each corresponding milestone in Schedule E as follows:

B	SUBSCRIPTION/LICENSE FEE (BASED ON NUMBER OF USERS	%	TOTAL (RM)
1.	Year 1 — Implementation		
	1. During User Requirement Study Sign Off		2,980,000
	1. During User Acceptance Test Sign Off		1,788,000
	1. System Go Live		596,000
2.	Beginning of Year 2		5,364,000
3.	Beginning of Year 3		5,364,000
	TOTAL B.	54	16,092,000

[116] On 26 August 2019, SSM informed Liberty that there was a 11% variance between the actual progress of completion and the baseline completion schedule for the project. SSM informed Liberty that, at the current rate of progress, the project would not be completed on time and Liberty ought to take steps to ensure that the ERP System would achieve completion by the fourth extended completion date.

The fourth EOT request and SSM's notice of default

[117] Indisputably, the project was not completed by the fourth extended completion date.

[118] On 29 August 2019, just two days before the fourth extended completion date, Liberty issued a further EOT request ('fourth EOT request') citing, among others, the following:

> 3. Setakat tarikh surat ini masih terdapat pelbagai perkara tertunggak yang masih belum disempurnakan oleh pihak SSM bagi pelaksanaan User Acceptance Test (UAT), Final Acceptance Test (FAT) dan Go Live seperti yang termaktub dalam Perjanjian. Perkara-perkara yang tetunggak ini telah menyukarkan pihak LTRSB bagi menyiapkan Projek ERP ini seperti yang dipersetujui di dalam Perjanjian Tambahan Ketiga bertarikh 11 April 2019 ('Perjanjian Tambahan Ketiga').
>
> 4. Oleh yang demikian, setelah perkara berkaitan kelewatan ini dibangkitkan oleh LTRSB di Mesyuarat PWC dan PSC, ahli-ahli PWC dan PSC pada 26 dan 27 Ogos 2019 telah mencadangkan agar pihak LTRSB memohon untuk perlanjutan masa ('EOT') bagi memastikan Projek ERP ini dapat diimplementasi denga jayanya.
>
> 5. Sehubungan dengan cadangan tersebut, kami memohon perlanjutan masa menurut *Klausa 6.2(d), Perjanjian*, agar pihak SSM dapat melanjutkan project Completion Date tanpa mengenakan sebarang kos Liquidated Ascertained Damages (LAD) ke atas pihak LTRSB.

[119] Notably, Liberty had, for the very first time, cited cl 6.2(d) (instead of cl 6.2(b)) of the ERP agreement in applying for an EOT. The corollary of citing cl 6.2(d) was that Liberty attributed blame to SSM for the delays in achieving completion of the ERP System.

[120] SSM rejected Liberty's fourth EOT request on 19 November 2019. On the same day, SSM issued to LTRSB a notice of default and gave LTRSB 30 days to remedy its breach pursuant to cl 25.1(a) of the ERP agreement.

LTRSB's Mitigation Plan No 1 and No 2

[121] On 11 November 2019, approximately 2.5 months after the fourth extended completion date had lapsed, Liberty disclosed to SSM a proposed mitigation plan which included:

(a) a fourth EOT request;

(b) a request to be paid:

(i) RM507,680 for Infrastructure Readiness for Production Environment;

(ii) RM204,750 for the e-BSK/e-SSM system; and

(iii) RM9,594,604.66 for Oracle software license fees.

('Liberty's Mitigation Plan No 1')

[122] Aside from a request for more time and money from SSM, Liberty's Mitigation Plan No 1 did not set out any detailed plans to rescue the already delayed project.

[123] On 3 December 2019, Liberty revised its mitigation plan with the following proposals:

(a) the costs of the Oracle License Fees in the amount of RM15,881,907 be transferred to SSM, which had allegedly been advanced by Liberty on SSM's behalf;

(b) SSM pay Liberty RM712,430 for the:

(i) Infrastructure Readiness and Standard Module Installation — Production Environment + Standard Module; and

(ii) Solution Configuration — eBSK System.

(c) three modules (Core HR, Investment and e-SSM) be re-priced to a total of RM3,896,638 payable by SSM;

(d) four other modules (Room Booking, Fleet Management, eLearning and Knowledge Management) be re-priced to a total of RM2,140,497 payable by SSM;

(e) SSM adopt a further Oracle EBS application system and Liberty replace its Work Teams from India with local consultants;

(f) SSM to pay Liberty for support and maintenance for the next two years in the amounts of RM828,356 for the first year and RM861,489 for the second year;

(g) Liberty and SSM to enter into a new contract with a new price rate, new payment schedule and new implementation period;

(h) the integration process to be done after the System Go Live date, instead of before, with further discussions to be held with Liberty at the following rates:

No	Consultant	Daily Price Rate (RM)
1	Project Manger	2,500
2	System Analyzer	1,300
3	Senior System Developer	1,500
4	System Developer	1,000

('Liberty's mitigation plan No 2')

[124] The total cost of Liberty's mitigation plan No 2 was RM24,321,317 (excluding integration costs). Again, no real meaningful steps were put forward by Liberty to rescue the delayed project aside from its request for more money and time.

SSM's notice of termination

[125] Given that Liberty's had failed to remedy its breach within thirty days from SSM's notice of default, SSM issued a notice of termination on 19 December 2019 terminating the ERP agreement.

PARTIES' CLAIMS

[126] In the present action, Liberty's principle claims against SSM are for contractual payments in the sum of RM19,872,979.19 broken down as follows:

No.	Particulars	Amount (RM)
1.	Sum owing to Applied Business Systems Sdn Bhd as at 23 February 2020 for the Oracle On-Premise Licenses and Oracle Cloud Subscription Fees which was purchased and/or subscribed by the plaintiff on behalf of the defendant	17,633,549.19
2.	Infrastructure Readiness and Standard Module Installation	507,680
3.	EBSK Solution Configuration	204,750
4.	Pre-UAT	1,527,000
	Total:	RM19,872,979.19

[127] On the other hand, SSM has counterclaimed against Liberty for, among others, the following:

(a) a declaration that the ERP agreement had been lawfully terminated;

(b) damages to be assessed for Liberty's breaches of its express and implied representations and warranties under the ERP agreement; and

(c) a sum of RM14,195,178.73 broken down as follows:

(i) a refund of RM12,228,365.80 paid by SSM to Liberty for Liberty's failure to deliver a workable ERP System pursuant to cl 25.3(b)(i); and

(ii) liquidated ascertained damages ('LAD') in the amount of RM1,966,812.94 pursuant to cl 20 of the ERP agreement read together with cl 2.2 of SA No 3 and cl 2.3 of SA No 4.

LEGAL ISSUES

[128] The determination of the parties' aforesaid disputes requires this court to decide on the following legal and factual issues:

(a) whether SSM is contractually obliged to pay Liberty the sum of RM17,733,549.19 being the fee for the Oracle Software which Liberty had acquired from Oracle for the performance of the project;

(b) who was the party responsible for the delay to the project;

(c) whether SSM is liable to pay Liberty the Infrastructure Readiness and Standard Module Installation amounting to RM507,680, the 'eBSK Solution Configuration' module of RM 204,750 and the further sum of RM1,527,000 being what is called as the Pre-UAT claim;

(d) whether SSM had lawfully terminated the ERP agreement;

(e) whether SSM is entitled to claim for the refund of all payments made to Liberty for the project prior to termination; and

(f) whether SSM is entitled to claim for LAD and if so for which periods. Corollary to this is the legal question whether SSM can be permitted to claim both LAD *and* a refund of the monies paid.

[129] Each of the questions will be considered in turn.

Oracle fee

[130] In performance of the ERP agreement, Liberty had acquired and subscribed to the Oracle Software amounting to RM17,633,549.19 (inclusive of interest as at 23 January 2020) ('Oracle fee').

[131] Liberty seeks to claim this amount of RM17,633,549.19 (albeit will be higher now due to the accruing interest charged by ABS) from SSM.

[132] According to Liberty, SSM had paid RM3,158,800 towards the first part payment of the Oracle fee. Liberty contended that SSM had never once denied or protested that they are not liable to pay the Oracle fee.

[133] Reliance was placed on the testimony of DW1 who was the Director of Finance and Account from SSM. In particular, DW1 had confirmed during cross-examination that regardless of what happens to the ERP agreement, SSM is liable to pay the Oracle fee of up to RM18m. This was based on the minutes of PWC meeting No 6/2019 on 11 November 2019:

GK: 'Projek ini juga tidak boleh dipecahkan mengikut modul bagi pembayaran

lesen. Oleh itu, ia tidak boleh disiapkan secara staggered. Dan jilka ahli PWC bersetuju untuk secara staggered, SSM masih perlu membayar kos lesen yang berjumlah RM18 juta.' So, setuju dengan cadangan saya that no matter what happened to this agreement, SSM is liable to pay the Oracle license? This is your own minutes.

ZAS: Yes.

GK: Setuju?

ZAS: Yes.

[134] Based on the aforesaid, Liberty contended that SSM is estopped from denying its liability to pay the Oracle fee. After all, the Oracle Software was purchased by Liberty solely for SSM's benefits. The ownership, copyright and intellectual property rights of the Oracle Software also rests with SSM who shall have a non-exclusive and non-transferable right to use the Oracle Software pursuant to cl 13.1 of the ERP agreement.

[135] With respect, I disagree.

[136] Clause 8.1 of the ERP agreement sets out the Scope of Services to be provided by Liberty to SSM. This includes '... (d) to supply, deliver, install, commission of software for implementation of the SSM's Enterprise Resource Planning as specified in the Bill of Material including but not limited to Oracle Cloud Services'.

[137] In consideration of Liberty performing its obligations under the ERP agreement, SSM shall pay a total sum of RM29.8m to Liberty. This sum was subsequently increased to RM35,530,152. The payment was to be made in accordance with Schedule E of the ERP agreement. This is stated in cl 14.2 of the ERP agreement.

[138] In respect of the rights to software and the payment for the same, cl 13 of the ERP agreement stipulates thus:

13. RIGHTS IN SOFTWARE

13.1 The ownership, copyright and intellectual property rights of the Licensed Software shall remain with the owner or licensor of such Licensed Software, *SSM shall have a non-exclusive, non-transferable right to use the Licensed Software for the duration of this Agreement, subject to payment of the Price in accordance with Schedule E*. Use of all Licensed Software is subject to any and all relevant terms and conditions imposed by the owner or licensor of such Licensed Software. For the avoidance of doubt, where there are any licensed components proprietary to third parties which form part of the Customised Modules, all Intellectual Property Rights in respect of such components shall remain with the licensor and SSM shall merely have a license to use the same in accordance with the relevant licensing terms.

13.2 Third Party Software

13.2.1 LTRSB shall be responsible for the supply, delivery, installation, testing and commissioning of the Third Party Software.

13.2.2 LTRSB shall deliver to SSM the Third Party Software in an electronic media for each of the Third Party Software.

13.2.3 LTRSB shall ensure that the Third Party Software delivered in paragraph 13.2.1 shall be installable and executable.

13.2.4 The numbers of the Third Party Software to be delivered are a specified in Schedule G of this Agreement.

132.5 LTRSB shall arrange with the proprietor of the Third Party Software for a direct license, through LTRSB, for SSM and shall provide maintenance and support of all the Third Party Software. In order to facilitate the support, SSM shall provide LTRSB with all relevant credentials/accounts related to the support services of the Third Party Software.

13.2.6 LTRSB shall at its own cost and expenses provide maintenance and support services of all the Third Party Software during the Support and Maintenance Period.

13.2.7 *The cost of all Licenses for the Third Party Software shall be borne by LTRSB.*

[139] A number of salient points may be drawn from cll 13.1 and 13.2 above:

(a) first, there is no express language to the effect that Liberty is obliged to acquire any Oracle software on SSM's behalf;

(b) second, insofar as SSM's payment obligations are concerned, SSM is only required to make payment in accordance with Schedule E to the ERP agreement; and

(c) third, cl 13.2.7 clearly prescribes that all costs relating to third party software (such as the Oracle Software) is to be borne by Liberty.

[140] Critically, it is *not* Liberty's pleaded case that SSM is in breach of its payment obligations under Schedule E. Instead Liberty's claim for the Oracle fee is premised on the following facts:

(a) Liberty had purchased the Oracle Software from Oracle for the ERP project under the ERP agreement;

(b) the Oracle Software is for the sole benefits of SSM who has ownership, copyright and intellectual property rights to the same and SSM has the non-exclusive and non-transferable right to use the Oracle Software; and

(c) SSM had purportedly agreed to assume the obligation to pay the Oracle fee.

[141] As provided for in cll 13.1 and 14.2(a) of the ERP agreement, the third-party software license fees payable by SSM must accord with Schedule E to the ERP agreement.

[142] In this regard, Item B of Schedule E provides as follows:

B.	SUBSCRIPTION/LICENSE FEE (BASED ON NUMBER OF USERS)		
1.	Year 1 – Implementation		
	1.1. During User Requirement Study Sign Off		2,980,000
	1.2. During User Acceptance Test Sign Off		1,788,000
	1.3. System Go Live		596,000
2.	Beginning of Year 2		5,364,000
3.	Beginning of Year 3		5,364,000
	TOTAL B.	54	16,092,000

[143] Given that SSM has already paid Liberty for item 1.1 for the 'During User Requirement Study Sign Off' stage (the sum of RM 3,158,800 being the contract sum of RM2.98m inclusive of tax), Liberty's RM17,633,549.19 claim would presumably only be for the license fees under:

(a) item 1.2 (during UAT);

(b) item 1.3 (during System Go Live);

(c) Year 2; and

(d) Year 3.

[144] As a start, Liberty has not even demonstrated nor clarified how it arrived at a figure of RM17,633,549.19, in particular, what components make up that figure, or even how such components correspond to the items outlined in Schedule E.

[145] Furthermore:

(a) Liberty confirmed that the ERP agreement had been terminated even before the UAT could be completed (ie before item 1.2 (during UAT));

(b) Years 2 and 3 were never commenced given that the termination occurred in Year 1; and

(c) Liberty's purchase orders (according to ABS' letter dated 25 February 2020) were submitted to ABS for license durations *beyond* the termination of the ERP agreement:

2. Please note that you had issued us purchase orders as follows:-

No.	[illegible]	[illegible]	[illegible]	[illegible]
1.	LTR/PO17/SSM/053	18 Aug 2017	Oracle On-Premise Licenses and Oracle Cloud Subscriptions Fees - For 3 Years	RM13,367,400.45
2.	PO202	24 May 2019	Oracle On-Premise Licenses and Oracle Cloud Subscriptions Fees - starting from 31 August 2020 to 31 August 2021	RM605,333.36
3.	PO203	24 May 2019	Oracle for Oracle On-Premise Licenses and Oracle Cloud Subscriptions Fees - Renewal Supercede for 27 months	RM5,463,040.90
Total without tax				RM 19,435,774.71
Tax (Only for Item1 Dated 18/08/2017)				RM 802,044.03
Grand Total				RM 20,237,818.74

[146] In other words, the claim for RM17,633,549.19 included license fees extending *after* the termination of the ERP agreement.

[147] Putting aside the fact that Liberty has failed to demonstrate any contractual entitlement to such payments, Liberty also has not shown it had actually incurred such fees.

[148] Liberty has merely shown a letter dated 4 March 2020 enclosing a letter from ABS requesting payment from Liberty in the amount of RM17,633,549.19. When pressed during cross-examination, Liberty's Chief Executive Officer ('CEO') confirmed that:

(a) Liberty did not adduce any evidence of any purchase orders submitted to ABS; and

(b) that to date, Liberty has only paid ABS a sum of approximately RM3.1m.

[149] Bearing these admissions in mind, it appears that Liberty expects to recover RM17,633,549.19 for the Oracle Software license fees allegedly incurred on behalf of SSM despite having expressly admitting that it has only

A incurred RM3.1m. Even this said sum allegedly paid is not supported by any documents.

[150] In any case, it is my judgment that SSM simply has no obligation to *reimburse* Liberty for the Oracle fee as such costs for Third Party Software is to be borne by Liberty. SSM's payment obligations in respect of the Third Party software are confined to payment of the licence fees based on Schedule E of the ERP agreement and nothing more.

[151] As regards the 'admission' by DW1 that SSM is obliged to make the payment for the Oracle fee, this 'admission' was made during the PWC meeting No 6/2019 on 11 November 2019. At that time, SSM had not exercised its rights to terminate the ERP agreement.

[152] With the termination of the ERP agreement pursuant to the notice of termination on 19 December 2019, SSM cannot not be liable for any future obligations under the ERP agreement unless this court finds that the termination was unlawful. This is not even the position taken by Liberty.

[153] In any case, the purported 'admission' has been taken out of context. Upon perusal of the minutes of the aforesaid meeting in its entirety, it is patently obvious that the discussion was not in respect of whether SSM was liable to pay Liberty the RM18m licence fee at all. The context of the discussion was whether SSM would be able to avoid paying the full sum of RM18m in the event that SSM were to decide to proceed with the project on a staggered completion basis. The 'admission' to pay was premised on SSM agreeing to accept Liberty's proposal and Liberty delivering a completed ERP System to SSM which is not the case.

[154] For the reasons above, I find that Liberty's claim for the sum of RM17,633,549.19 being the Oracle Software license fees is wholly without any merits.

Delay — Who was responsible

[155] It is not in dispute that at the time SSM issued its notice of termination on 19 December 2019 terminating the ERP agreement, Liberty had not completed the project.

[156] In this regard, Liberty contended that the delay was attributed to:

(a) SSM's selection of FUSE as its middleware;

(b) SSM's delay in the data migration process;

(c) SSM's failure to follow and or adopt Liberty's Oracle Unified Methodology; and

(d) SSM's request for changes to the requirements to the ERP System ie from Full Cloud Solution to Hybrid Solution ('Liberty's delay allegations').

[157] More specifically, Liberty contended that SSM's indecisiveness relating to the 'Full Cloud vs Hybrid' issue had caused a 'domino effect' to the overall progress of the project.

[158] However, Liberty has not produced any expert report to support its case that the aforesaid events were the cause for the delay and in fact critical to the progress of the works. There is no delay analysis whatsoever placed by Liberty before this court to demonstrate and identify the causes which had actually delayed the completion date of the ERP agreement or the extent and nature of these delays.

[159] The construction of a critical path analysis of the delays to completion would normally be expected in disputes involving contested allegations of delay liability. In the present case, Liberty has failed to disclose the relevant documentary evidence consisting of the live baseline programme, development/programming activities, testing results, readiness assessments and weekly/monthly progress reports ('delay documents').

[160] Without the benefit of the delay documents, and even with technical expert assistance, SSM has been unable to construct a critical pathway analysis of the delays to the project. Indeed, SSM's appointed expert, DW5 readily conceded during cross-examination that he had insufficient information and documentation to construct a critical pathway analysis of the delays to the completion of the ERP System.

[161] As with construction and engineering disputes, the analysis of delays, EOT entitlement, prevention and prolongation expense is a technical exercise which the court ordinarily requires the assistance of expert opinion.

[162] Without the benefit of expert input, it would be virtually impossible for this court to fully appreciate the critical impact and significant of the delay allegations and, consequently, arrive at a comprehensive view on delay liability. Such sentiments have been echoed in:

(a) the High Court decision of *Ong Saut Mee & Ors v Gasing Meridian Sdn Bhd* [2021] MLJU 138:

> [75] I have carefully read DW1's testimony as well as reviewed the supporting documents relied by him *but I find that he has merely made a lay rudimentary*

estimate of the defendant's extension of time entitlement. It is in substance *an impressionistic assessment of the defendant's entitlement to extension of time* of 1,481 mitigating days in the Basic Works. *The supporting documents are primarily unprocessed raw data comprising of correspondences, minutes of meetings, photographs, etc. This impressionistic assessment is in my view inadequate to discharge the defendant's required burden of proof*. There is, in other words, *no comprehensive detail delay analysis undertaken by DW1. Normally, the requisite analysis is done by an expert delay analyst who would systematically review the whole history of the project execution and thereafter assess methodically in a scientific way the impact of all relevant delay events against the relevant work programme based on the relevant raw primary data*. There may be adjustments made for float, concurrency, mitigation, etc. in the course of the analysis *to derive a realistic fair and reasonable extension of time ultimately. This detail exercise has regrettably not been undertaken here*. In addition, I find that the defendant has further not cogently co-related the 1,481 mitigating days in the Basic Works to the Bungalow Lot specifically.

[76] In the circumstances, *I therefore find and hold that the defendant has not discharge its burden of proof* to be excused for late delivery of vacant possession of the Bungalow Lot of 942 days between 26 August 2012 and 28 March 2015.

(b) the English Technology and Construction Court decision of *HSM Offshore BV v Aker Offshore Partner Ltd* [2017] EWHC 2979 (TCC), where the High Court characterised the absence of expert evidence, which was not requested by either party, as a 'grievous loss to comprehension and clarity'.

[163] Notwithstanding the non-availability of the delay documents, SSM appointed a technical expert, Mr Stephen L Ditty (DW5) to render an opinion on documents available in these proceedings for the benefit of this court to assist in improving 'clarity and comprehension'.

[164] Briefly, DW5's opinion may be summarised into three key points:

(a) first, there is insufficient documentation to construct a critical pathway analysis of the delays to the completion ERP System;

(b) second, there are no identifiable documentation to substantiate Liberty's delay allegations; and

(c) third, in all likelihood, the events that would have caused delays to the project were:

(i) Liberty's 'flawed' decision to implement a full-cloud solution for the ERP System;

(ii) the change(s) of Liberty's implementation partner(s) throughout the pendency of the project; and

(iii) Liberty's belated preparation and identification of external-internal integration points.

[165] More specifically, DW5's opined as follows:

> In terms of LTRSB's pleaded case, I note that LTRSB alleges that *most, if not all, of the delays to the ERP project were caused by a 'domino effect of delay' rooted in SSM's alleged indecisiveness on whether to adopt and all-Cloud solution or the Hybrid version*. I make the following observations in this regard:
>
> – the issue of whether to adopt an all-Cloud solution or Hybrid version *is a matter of systems design* and I am instructed that the 'scope of Services for this project includes ... design'. The Hybrid version represented an alternative replacement for the original design of an all-Cloud solution submitted by LTRSB based on Oracle Cloud Applications which was not in line with local Government requirements;
>
> – this *issue of whether to adopt an all-Cloud solution or the Hybrid version would have been unnecessary had LTRSB correctly accounted for this government constraint* on the server location placements and proposed either the all-Cloud solution or the Hybrid version in their Technical Response;
>
> – it is clear to me that this had already become an issue of concern since 23 March 2017, and so LTRSB was aware of the same since 23 March 2017, and yet LTRSB did not propose any correction to their earlier design for a considerable period of time — at least from 26 July 2016 (ie, the date of LTRSB's Technical Proposal to 24 march 2017 (ie, the date of LTRSB's letter). *It would appear that the flaw in their original design could have been corrected by LTRSB before their 24 March 2017 letter*;
>
> – in any event, without having access to the necessary project documentation, such as the development/programming activities, testing results, readiness assessments, baseline programs/schedules and weekly/monthly reports, *it cannot be reasonably nor reliably concluded that the alleged indecision on SSM's part had caused a 'domino effect of delay' or in other words, a critical path delay, to the ERP project*;
>
> – without such documentation, it cannot be concluded that SSM's alleged indecisiveness was situated on the critical path nor is it conclusive that other workstreams of the ERP project would not have been able to progress as planned;
>
> – the alleged delay on the part of SSM's indecisiveness, if any, *would have only been approximately 1 1/2 months* (from project kick-off on 13 April 2017 to SSM's decision to adopt hybrid servers); and
>
> *– the 5-month extension of the project completion date under the first Supplemental Agreement dated 31 December 2017 would have likely dealt with and remedied any issues arising from this alleged 1 1/2 months delay*.

[166] Notably Liberty had never once challenged DW5's expert views either

by offering a rebuttal expert report or by cross-examining him on the content of his report.

[167] Instead, learned counsel for Liberty seemed contended to undermine DW5's opinion solely on the ground that DW5 had confirmed that he had insufficient documentation to construct a critical pathway analysis of the delays to the completion of the ERP System.

[168] However, learned counsel for Liberty failed to appreciate that it is Liberty who bears the burden of proving that SSM was responsible for the delay in not being able to meet the completion date for the ERP System.

[169] Given the dearth of delay documents enabling the construction of a critical pathway analysis and/or any identifiable documents to support the notion that SSM was responsible for the delays, Liberty has effectively failed to prove that SSM had committed acts of prevention delaying the completion of the project.

[170] On the other hand, DW5 has given his expert opinion on causes for the delays based on the available evidence before this court and his opinion has not been challenged or opposed by counsel for Liberty at all. It is not suggested by Liberty that DW5's expert opinion is 'obviously lacking in defensibility'.

[171] It is trite law that a court should accept unopposed expert opinion unless it is 'obviously lacking in defensibility' as held by the High Court in *PB Malaysia Sdn Bhd v Samudra (M) Sdn Bhd* [2009] 7 MLJ 681 as follows:

> [71] The duties of a judge in dealing with unopposed expert witness are succinctly stated in an extract of 10 *Halsbury's Laws of Singapore* [2000] (120.257) which cited in para 26 of the Singapore Court of Appeal's decision in *Saeng-Un Udom v Public Prosecutor* [2001] 3 SLR 1 (per LP Thean JA) as follows:
>
> > ... *The court should not, when confronted with expert evidence which is unopposed and appears not to be obviously lacking in defensibility, reject it nevertheless and prefer to draw its own inferences*. While the court is not obliged to accept expert evidence by reason only that it is unchallenged (*Sek Kim Wah v Public Prosecutor* [1987] SLR 107), *if the court finds that the evidence is based on sound grounds and supported by the basic facts, it can do little else than to accept the evidence*. In this case, it certainly cannot be said that Dr Lau's opinion was 'obviously lacking in defensibility'. In our opinion, his evidence was based on sound grounds and supported by the basic facts. In the face of such evidence, the judge, with respect, was not entitled to venture his own opinion on a matter which was clearly 'outside the learning of the court'. In our judgment, in this case, he was not entitled to reject Dr Lau's opinion and substitute it with one of his own.

[172] In the circumstances, this court accepts DW5's unopposed expert

opinion and holds that Liberty remains in breach of cl 6.2 of the ERP agreement (read together with cl 2.1(a) of SA No 4) for failing to achieve completion of the ERP System on or before the fourth and final extended completion date of 31 August 2019 ('fourth extended completion date').

Infrastructure Readiness and Standard Module Installation amounting to RM507,680

[173] As part of Liberty's Scope of Services under the ERP agreement, Liberty claimed that it had conducted and completed the 'Infrastructure Readiness and Standard Module Installation' phases on 17 May 2019.

[174] In fact, the 'Infrastructure Readiness and Standard Module Installation' phases had been signed off by SSM:

SSM ERP Project

Infrastructure Readiness and Standard Module Installation:

Production Environment + Standard Module

1. This is to certify that the verification of the Infrastructure Readiness and Standard Module Installation for Production Environment + Standard Module had been conducted from 22 February 2019 to 23 April 2019 in accordance with the standard specifications for as below:
   a. Oracle E-Business Suite (EBS) & Oracle Service-Oriented Architecture (SOA) Application and Database on On-Premise Server for SSM ERP Production Environment.
   b. Oracle PeopleSoft Application and Database on On-Premise Server for SSM ERP Production Environment.
   c. On-Premise Server for Custom Applications and Database for SSM ERP Production Environment.
   d. On-cloud Service verification for SSM ERP Production Environment.
   e. ELMS Knowledge Management and eLearning Application on On-Premise server for SSM ERP Production Environment
2. To record users' feedback for any issues/comments found during the sessions in the table provided.

Acknowledgements:

SSM	
SAIFUL BAHARI AHMAD ICT Infrastructure	MOHD AZREE MOHD SAPIE ICT Infrastructure
16/5	17/5/2019
MAI ZULAIHA BAHARUDDIN Project Manager	ZARINA ABDUL SAMAD Project Director
LIBERTY	
MOHD SYAHFULNIZAM MOHD NOR Project Manager	EDINOLFI KAMALUL AZMI Infrastructure Lead

[175] To this end, DW1 testified that Liberty needed to be paid for work done upon completion of the same, and upon signing off by SSM.

[176] Thus, in reliance on *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697, *Pernas Construction Sdn Bhd v Sykt Rasabina Sdn Bhd* [2004] MLJU 759 and *Daya CMT Sdn Bhd v Yuk Tung Construction Sdn Bhd* [2018] MLJU 871 where the courts had held that irrespective of whether the termination of a contract was lawful or not, the party in question was entitled to be paid for work done up to the date of the said termination, Liberty claimed that this is a clear-cut case that Liberty is entitled to be paid RM507,680 for the completion of the 'Infrastructure Readiness and Standard Module Installation' phases.

[177] Similarly, as part of Liberty's Scope of Services under the ERP agreement, Liberty claimed that it had conducted and completed the 'eBSK Solution Configuration' phase on 26 August 2019.

[178] Liberty contended that the 'eBSK Solution Configuration' phase had similarly been signed off by SSM:

SSM ERP Project

SOLUTION CONFIGURATION

eBSK System

Purpose:

1. This is to certify that the verification of the Solution Configuration had been conducted from 29 May 2019 to 24 June 2019 in accordance to the eBSK's Module Functional Design (MFD) specifications and for claim purposes as stipulated in the project payment milestone for below sub system/module:
   1. eBSK - eStaff Financing
   2. eBSK - eFacility (Handphone)
   3. eBSK - eClaim TNT
   4. eBSK - eClaim HR (Claims & Allowances)
   5. eBSK - eRetirement
   6. eBSK – eWelfare
   7. eBSK - eAuthority Card
   8. eBSK - eMedical
2. To record users' feedback for any issues/comments found during the sessions in the table provided.

   Note: eBSK System or later known as eSSM System is one of the system developed for SSM Transformation Programme's ERP project.

Acknowledgements:

SSM	
ADZMAN AHMAD Project Lead, Human Capital Department	ROHANI MOHAMED NASIR Project Lead, Finance & Account Department
KAMARUDIN MOHD DAUD Project Lead, HR Core, Human Capital Department	SITI HAJAR ADANAN Project Lead, Admin & Facility Department
MAI ZULAIHA BAHARUDDIN Project Manager	ZARINA ABDUL SAMAD Project Director
LIBERTY	
BOB JOHAN ZULKIFLI Functional Consultant Lead	MUHAMMAD NAZREEN SHAH MAULA ZIN Functional Consultant Lead
	MOHD SYAHFULNIZAM MOHD NOR Project Manager

[179] To this end, Liberty relied on DW1's testimony that who had said during cross-examination that Liberty needed to be paid for work done upon completion of the same, and upon signing off by SSM.

[180] Liberty therefore contended that this is also a plain case where Liberty is entitled to be paid RM204,750 for the completion of the 'eBSK Solution Configuration' phase.

[181] In addition to the aforesaid, Liberty further claim a sum of RM1,527,000 being what is called as the Pre-UAT claim. This Pre-UAT amount involved work in respect of 4 systems. Within each system are different module(s).

[182] The breakdown of the Pre-UAT amount of RM1,527,000 which Liberty seeks to claim against SSM is as follows:

No	Systems	Amount (RM)
(a)	Financial Management System	763,500
(b)	CRM System	111,750
(c)	Admin and Building Management System	540,000
(d)	Project Management System	111,750
	Total:	RM1,527,000

[183] To support Liberty's entitlement to the pre-UAT amount, learned counsel for Liberty relied upon the table in para 66 of the statement of claim ('Pre-UAT Table').

Pre-UAT Table:

No	Task Name	Session Completed	Test Script Received From SSM Status	Date Received from SSM	Pre-UAT Sign Off	Pre-UAT Sign off Date by SSM
1.	Taleo Recruitment	29 April 2019	Yes	29 April 2019	Yes	29 April 2019
2.	Talent Management	7 May 2019	Yes	7 May 2019	Yes	7 May 2019
3.	EPBCS — Planning and Budgeting	14 May 2019	No	–	No	–
4.	Supplier to Sourcing	17 May 2019	Yes	20 August 2019	No	–
5.	Procure to Pay	10 May 2019	No	–	No	–
6.	Invoice to Cash	21 May 2019	No	–	No	–
7.	Asset to Retire	29 May 2019	No	–	No	–
8.	Record to Report	23 May 2019	No	–	No	–
9.	Asset to Maintenance	13 June 2019	Yes	14 June 2019	No	–
10.	project Costing	26 July 2019	Yes	26 July 2019	No	–
11.	PMO — Instantis	14 June 2019	Yes	14 August 2019	Yes	14 August 2019
12.	Contact to Resolution — SRM	17 May 2019	Yes	23 May 2019	Yes	21 August 2019
13.	Contact to Resolution — Eloqua	21 May 2019	Yes	23 May 2019	Yes	21 August 2019
14.	Contact to Resolution — Service Cloud	23 May 2019	Yes	23 May 2019	Yes	21 August 2019

[184] Learned counsel for Liberty contended that the 'CRM System' and 'project Management System' viz items (b) and (d) of the table in para 160

above had been signed off by SSM on 21 August 2019 and 14 August 2019 respectively.

[185] As for the 'Financial Management System' and 'Admin & Building Management System', it is contended that they had been completed in May 2019 and June 2019 respectively but SSM has without any reasons, failed, refused and or neglected to return the test scripts to date, and to sign off the same.

[186] Liberty further contended that all the 21 integration test points had been tested and completed under the Pre-UAT stage.

[187] Based on the aforesaid, it is submitted that Liberty is entitled to the sum of RM1,527,000.

[188] Now, cl 14.2(a) of the ERP agreement provides that any payments to Liberty shall be paid in milestone payments according to Schedule E of the ERP agreement which is reproduced as follows:

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A

SCHEDULE E

PRICE

1. **Price**

B

Total price payable by SSM to LTRSB under this Agreement RM 29,800,000.00 (exclusive 6% GST).

2. **Payment milestones**

From the table below Total (A)+(B)+(C)+(D) = RM 29,800,000.00.

C

NO.	ITEMS	%	TOTAL (RM)
A.	**PROJECT IMPLEMENTATION**		
1.	Project Kick Off & Mobilization	5	1,490,000.00
2.	Project Planning		
	2.1. Infrastructure Planning	2	596,000.00
	2.2. User Requirement Study: - Stream 1 – Finance, Procurement & Budgeting - Stream 2 – Core HR, Payroll & CRM - Stream 3 – e-Learning, KM, PM Tool, Investment & Custom Modules	2	596,000.00
	2.3. Module Functional Design: - Stream 1 – Finance, Procurement & Budgeting - Stream 2 – Core HR, Payroll & CRM - Stream 3 – e-Learning, KM, PM Tool, Investment & Custom Modules	2	596,000.00
3.	Project Execution		
	3.1. Infrastructure Readiness and Standard Module Installation	4	1,192,000.00
	3.2. Solution Configuration: - Stream 1 – Finance, Procurement & Budgeting - Stream 2 – Core HR, Payroll & CRM - Stream 3 – e-Learning, KM, PM Tool, Investment & Custom Modules	6	1,788,000.00
	3.3. Integration & Data Migration Setup: - Stream 1 – Finance, Procurement & Budgeting - Stream 2 – Core HR, Payroll & CRM - Stream 3 – e-Learning, KM, PM Tool, Investment & Custom Modules	6	1,788,000.00
	3.4. CRP/Pre-User Acceptance Test: - System Testing & Integration Test - Data Migration Test	6	1,788,000.00
	3.5. Training (Train the Trainer)	2	596,000.00

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[189] The upshot of the above is that Liberty is only entitled to payment(s) for items 3.1, 3.2 and 3.4 of Schedule E upon completing each corresponding milestones.

[190] With respect to item 3.1 (Infrastructure Readiness and Standard Module Installation), Liberty itself had admitted during a PWC meeting on

24 June 2019 that there remained outstanding issues with item 3.1:

ID	Issue/Comment	Remarks
1.	To show the switchover / failover exercise from PDC to SDC or vice versa during FAT session. Data replication using Dataguard	Switchover between nodes had been covered in this verification session. For FAT, to show the switchover between PDC & SDC.
2.	To show the media file replication from PDC to SDC or vice versa using replication tools for example RSync during the FAT session.	
3.	To include the security testing (WAF, whitelist, etc) during FAT session.	LTRSB will provide the whitelisting to SSM ICT for configuration and preparation for FAT.

[191] In this regard, Liberty had agreed with SSM that it would prepare a checklist for all outstanding tests necessary to verify completion of the Infrastructure Readiness and Standard Module Installation ('IRSMI Checklist').

[192] More specifically, in the Minutes of Meeting on 24 June 2019, in relation to the discussion for the proposed payment of the Infrastructure Readiness and Standard Module milestone 3.1, it was concluded that a checklist was needed in respect of the tests that had been conducted prior to the matter being brought again to the PWC for payment.

[193] However, todate, Liberty has not prepared and submitted the IRSMI Checklist or any check list to SSM. As such, it does not appear to this court that merely because SSM had 'signed off' the 'infrastructure readiness', the payment for the Infrastructure Readiness and Standard Module Installation was due at the time of termination of the project by SSM.

[194] Similarly, in relation to items 3.2 (EBSK Solution Configuration, which forms part of the Solution Configuration milestone), SSM referred this court to Liberty's own record which shows that as at 20 August 2019, the eBSK Solution Configuration had remained incomplete. This probably explains why Liberty had not even issued any invoice for payment for the eBSK Soluition Configuration.

[195] In relation to the Pre-UAT, as at 20 August 2019 ie just 11 days away from the fourth extended completion date, Liberty reported that there were still outstanding works for the Pre-UAT.

[196] There is also the disagreement as to whether Liberty needed to

A complete the testing of all 111 of the Integration Points or merely just the 21 that were completed.

[197] Whatever may be the agreement between the parties regarding the agreed number of testing of the Integration Points, what cannot be disputed is the fact that Liberty has clearly not completed the entire Pre-UAT tasks under item 3.4 of the Schedule E to justify raising its invoice for the module.

[198] In acknowledging the aforesaid, learned counsel for Liberty submitted that the claim under the Pre-UAT module in the present action is only for such portions of the Pre-UAT tasks that had been signed off by SSM.

[199] With respect, there is no provision in the ERP agreement which allows Liberty to make such ad hoc claims. Although learned counsel for Liberty had alluded to previous occasions where such ad hoc claims had been made and paid by SSM, in all those previous occasions, invoices were issued and presumably agreed to by SSM. There is no evidence that in respect of the Pre-UAT tasks, such partial claims were agreed to by SSM.

[200] In the premises and for the reasons above, Liberty's claims for the 'Infrastructure Readiness and Standard Module Installation', 'eBSK Solution Configuration' and the Pre UAT amount are rejected.

[201] In any case, as will be seen below, in the event that this court is finds that SSM was entitled to terminate the ERP agreement and to require Liberty to refund all monies paid by SSM to Liberty under the ERP agreement, Liberty's claims that it had in fact completed the 'Infrastructure Readiness and Standard Module Installation', 'eBSK Solution Configuration' and the portions of the Pre UAT tasks signed off by SSM will be of no moment.

[202] With the aforesaid in mind, I will now consider SSM's counterclaim.

SSM'S COUNTERCLAIM

[203] SSM is seeking a declaration that the ERP agreement has been lawfully terminated in accordance with cl 25.1 of the ERP agreement which stipulates thus:

> 25. TERMINATION AND EFFECTS OF TERMINATION
>
> 25.1. Default of LTRSB
>
> (a) *LTRSB commits a breach of any provision of this Agreement* , which being capable of remedy, is not remedied by LTRSB within thirty (30) days from the date SSM notifies LTRSB to do so; or

...

then SSM may give notice in writing to LTRSB specifying the default In writing (hereinafter referred to as the 'Default Notice') and if LTRSB shall fail to remedy such default within the period stipulated in the Default Notice taking into account the nature of the remedy to be carried out ('Remedy Period').

25.2. *If LTRSB fails to remedy the relevant default within the Remedy Period or such other period as may be determined by SSM, SSM shall have the right to terminate this Agreement with immediate effect by giving notice to that effect to LTRSB*.

[204] It is not disputed that on 19 November 2019, Liberty had made a request to SSM for the fourth EOT. This was not acceded to by SSM. Instead on the same day, SSM issued a notice of default giving Liberty 30 days to remedy its breach pursuant to cl 25(1)(a) above, namely to achieve completion of the ERP System on or before the fourth extended completion date on 31 August 2019.

[205] It is also not disputed that Liberty had failed to remedy its breach within the said 30 days from the notice of default which led to the notice of termination on 23 December 2019 terminating the ERP agreement.

[206] Liberty was originally obliged to deliver a completed and operable ERP System by 31 October 2017 pursuant to cl 6.2 of the ERP agreement ('original completion date').

[207] Due to several delays in the completion of the ERP System, the original completion date was extended four more times as follows:

(a) from 30 October 2017 to 31 March 2018 ('first extended completion date') by virtue of cl 2.2 of supplemental agreement No 1 dated 31 December 2017 ('SA No 1');

(b) from 31 March 2018 to 30 September 2018 ('second extended completion date') by virtue of cl 2.2 of supplemental agreement No 2 dated 27 August 2018 ('SA No 2');

(c) from 30 September 2018 to 31 March 2019 ('third extended completion date') by virtue of cl 2.2 of supplemental agreement No 3 on 11 April 2019 ('SA No 3'); and

(d) from 31 March 2019 to 31 August 2019 ie the fourth extended completion date by virtue of cl 2.1(a) of supplemental agreement No 4 dated 5 September 2019 ('SA No 4').

[208] It is not disputed that Liberty did not deliver a completed and operable ERP System by the fourth extended completion date.

[209] In order for Liberty to resist SSM's claim for the declaration that the ERP agreement had been lawfully terminated, Liberty has to show that its inability to meet the fourth extended completion date was not due to any failure or fault on their part. In other words that Liberty was not responsible for the delays.

[210] As alluded to above, this court has already found that the delay was not caused by SSM but was attributed to Liberty.

[211] Accordingly, if must follow that the termination by SSM of the ERP agreement was lawful.

[212] In fact, Liberty's primary focus on SSM's counterclaim was on its claim to a refund of all sums paid by SSM to Liberty under the ERP agreement up to the time of the termination amounting to RM12,228,365.80.

[213] In this regard, cl 25.3(b)(i) of the ERP agreement stipulates:

> 25.3. Effect of Termination by Default of LTRSB
>
> In the event that this Agreement is terminated pursuant to Clause 25.2, the following shall apply:
>
> ...
>
> (b) in the case of a termination at any time during the Contract Period, SSM shall have the right to either —
>
> (i) require LTRSB, and LTRSB shall, at its own expense, within a period of thirty (30) days from the date of termination remove the ERP Solutions and other materials supplied by LTRSB and Installed at or kept at the Location or any other location in connection with the implementation of its obligations and shall make good all damages caused by such removal or detachment *and LTRSB shall forthwith refund all monies paid to it by SSM under this Agreement* ...

[214] However, whilst para 4(b) of the notice of termination states that Liberty is to 'remove the ERP Solutions and other materials supplied by Liberty and installed or kept at SSM's premises within 30 days of the date of termination and to make good all damages caused by such removal', in para 4(e) of the same SSM had sought 'to retain all and or part of the ERP solutions which have been completed by Liberty up to the date of the notice of termination'. More specifically, para 4(e) states thus:

> (e) mengekal semua atau sebahagian daripada ERP Solutions yang telah disiapkan oleh LTRSB sehingga ke tarikh notis penamatan dan LTSB hendaklah mengemukakan sema dokumen dan lain-lain bahan berkaitan ERP Solutions kepada SSM tapa sebarang kos.

[215] Base on the aforesaid, learned counsel for Liberty contended that SSM is not entitled to a refund of the monies paid as there was no total failure of consideration. Moreover, with SSM seeking to retained all or parts of the ERP Solutions which had been completed up to the termination, to allow the refund will result in unjust enrichment to SSM.

[216] Reference was made to the Federal Court case of *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 where a distinction was made between the lawful termination of a contract and a rescission of the contract. Where a contract is lawfully terminated, it puts an end to the contract only as to the future but all past rights and duties under the contract remain unaffected. A right to rescind a contract only arises where there has been a total failure of consideration ie whether the party in default has failed to perform his promise in its entirety. It is only in the case where the contract is rescinded that a refund can be made.

[217] In the present case, SSM did not rescind the ERP agreement but had exercised its contractual rights under cl 25.3(b) to terminate the ERP agreement.

[218] Further, in reliance on s 56 of the Contracts Act 1950 , it was contended that SSM may only seek a full refund on the ground that Liberty had failed to perform within the time agreed, in this case, by the fourth extended completion date *and* that the ERP agreement is one where *time is of the essence*.

> 56 Effect of failure to perform at fixed time, in contract in which time is essential
>
> (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promise, if the intention of the parties was that time should be of the essence of the contract.

[219] Liberty contended that the parties had not intended that time should be of the essence in the ERP agreement for purposes of s 56(1) of the Contracts Act 1950 .

[220] More specifically, cll 6.2 and 6.3 of the ERP agreement provide that both parties are at liberty to apply for an extension of time to complete the ERP project.

> 6.2 Project Completion Date

(a) The Parties agree that LTRSB shall complete the project as required by SSM on 31st October 2017 (*Project Completion Date').

(b) If the progress of the Works is delayed or is becoming apparent to be delayed and the delay is solely caused by LTRSB, L'TRSB shall apply to SSM in writing for an extension of the Project Completion Date not less than thirty (30) days prior to the completion date. Upon receipt of such application, SSM may at its option extend the Project Completion Date as requested and imposed liquidated ascertained damage as described in Clause 20.

(c) In the event that the Project Completion Date is extended and such extension may affect existing Contract period, the Contract Period shall be further extended accordingly as mentioned in sub Clause 6.3 below,

(d) If the progress of the project is delayed or is becoming apparent to be delayed and the delay is solely caused by SSM, its servants and/or agents or by any third party and/or situation not within LTRSB's control, SSM shall extend the Project Completion Date (including the Contract Period if such extension may affect the existing Contract Period) upon request by LTRSB. In this situation there shall be no imposition of liquidate-ascertained damages on LTRSB.

6.3 Extension of Contract Period

(a) LTRSE shall notify SSM in writing not less than thirty (30) days prior to the Contract Expiry Date If it intends to extend the Contract Period for a further period. The Parties may as soon as reasonably practicable after the receipt of such notification by SSM, negotiate the terms and conditions of such extension not later than fourteen (14) days prior to the Contract Expiry Date.

(b) S5M may notify LTRSE in writing for an extension of the Contract Expiry Date at any time if it intends to extend the Contract Period for a further period. If such notification is considered, the Parties may, as soon as reasonably practical after the receipt of such notification by LTIRSB, negotiate the terms and conditions of such extension.

(c) In the event the Parties fall to reach an agreement, this Agreement shall automatically expire on the Contract Expiry Date.

[221] It is not a disputed in fact a total of 3 extensions of time were granted by SSM for Liberty to complete the ERP project pursuant to cl 6.2(b).

[222] Further, cl 20 of the ERP agreement provides for the payment of LAD calculated on a daily basis to compensate SSM for any delay in the completion of the ERP project.

20. DELAY AND LIQUIDATED DAMAGES

20.1. Liquidated Ascertained Damages

(a) If LTRSB delays or fails to complete the project by the dates specified in Schedule C or any extended date agreed upon by the Parties and save where such delay or failure is due to any act or omission of SSM, its servants and/or agents, LTRSB shall pay liquidated ascertained damages ('LAD') to SSM for each day of the delay.

(b) If LTRSB delays or fails to conduct the SIT or UAT or FAT by the date specified in Schedule C or any extended date agreed upon by the Parties and save where such delay or failure is due to any act or omission of SSM, its servants and/or agents, LTRSB shall pay LAD to SSM for the delay during the period beginning on the applicable date and ending on the date on which the ERP Solution is ready for the SIT or UAT or FAT, provided always that it shall not be later than three (3) months from such applicable date.

(c) In the event the ERP Solution fails to be fully operable or is unable to perform within fourteen (14) days after the Issuance of the Certificate of Final Acceptance for the FAT, and save where such failure is due to any act or omission of SSM, its servants and/or agents, LTRSB shall be deemed to have failed to perform its obligations under this Agreement and SSM shall have the right to impose LAD on LTRSB until the defect is rectified by LTRSB

(d) In the event that both Parties are responsible for the delay, LTRSB shall only be liable to pay LAD for any delay which is caused by any act or omission of LTSB, its personnel, agents or sub-contractors and shall not be liable for any delay caused by SSM. LTRSB shall not be liable to pay LAD for any delay caused solely by SSM.

20.2. Amount (a) Subject to Clause 20.1, if due to LTRSB's sole act, failure, omission and/or negligence, LTRSB fails to deliver or perform any part of or all of the Works within the Contract Period, SSM shall have the rights to impose LAD for each day of the delay until actual delivery or performance of the Works by LTRSB. The liquidated damages shall be calculated as follows:

(BR + 1.5%) x Contract Price/365 days X Number of Days Delayed

[223] In this regard, learned counsel for Liberty referred to the Indian case of *Hind Construction Contractors v The State of Maharashtra* 1979 AIR 720 .

[224] In *Hind Construction Contractors*, the appellant was employed to undertake the construction of an aqueduct. Construction had to be completed within 12 months. The appellant failed to do so and the respondent treated the contract as at an end. The Supreme Court when determining the issue of whether time was of the essence of the contract quoted the following passage from the fourth edition of *Halsbury's Laws of England*, Vol 4, para 1179:

> The expression time is of the essence means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract.

> Exceptionally, the completion of the work by a specified date may be a condition precedent to the contractor's right to claim payment. The parties may expressly provide that time is of the essence of the contract and where there is power to determine the contract on a failure to complete by the specified date, the stipulation as to time will be fundamental. *Other provisions of the contract may, on the construction of the contract, exclude an inference that the completion of the works by a particular date is fundamental, time is not of the essence where a sum is payable for each week that the work remains incomplete after the date fixed, nor where the parties contemplate a postponement of completion*.
>
> *Where time has not been made of the essence of the contract or, by reason of waiver, the time fixed has ceased to be applicable, the employer may by notice fix a reasonable time for the completion of the work and dismiss the contractor on a failure to complete by the date so fixed*. (The emphasis is that of Tulzapurkar J)

The learned judge then proceeded:

> It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract! The emphasised portion of the aforesaid statement of law is based on *Lamprell v Billericay Union,* [1849] 3 Exch 283 at p 308; *Webb v Hughes* [1870] 10 Eq 281 and *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616. It is in light of the aforesaid position in law that we will have to consider the several clauses of the contract Ex 34 in the case.

[225] In *Berjaya Times Square*, Gopal Sri Ram FCJ (as His Lordship then was) accepted the foregoing passages in *Hind Construction Contractors* as 'an accurate statement of the law governing s 56(1) of the Contracts Act 1950'. The following was said:

> [41] I respectfully accept that the foregoing passages are an accurate statement of the law governing s 56(1) of the Act. In my judgment, while individual contracts will fall to be interpreted in accordance with their own terms, it is a useful guide to construction that a stipulation as to time must be read along with other provisions of the contract to determine if time is truly of the essence of the contract. Further, a clause providing for the payment of a sum whether as a fine, a penalty or as liquidated damages calculated on a daily basis for the period that the work undertaken remains unfinished on the expiry of the time provided in the contract would, in the absence of a contrary intention to be gathered from the contract, point to time not being of the essence.
>
> [44] Returning to the mainstream, we have here an agreement which contains two

clauses. One that provides for the payment of a sum as liquidated damages calculated on a daily basis for the period of delay in making delivery of the premises in question and another that makes time of the essence of the contract. Applying the guidelines discussed earlier, it is my judgment that time is not of the essence of the agreement in this case. A promise to construct and deliver a building within a stipulated time coupled with a promise to compensate for any delay in delivery is inconsistent with a right to terminate on the ground that time is of the essence. It certainly points to an intention that time was not to be of the essence.

[226] Premised on the foregoing, upon a proper construction of the ERP agreement in its entirety, learned counsel for Liberty contended that time was not of the essence.

[227] With respect, *Berjaya Times Square* was a case relating to the common law right of rescission. The present case, on the other hand, has to do with SSM's claim for a refund of all sums paid to Liberty based on SSM's *contractual right* under cl 25.3(b)(i) of the ERP agreement.

[228] Accordingly, whether or not there is in this case a total failure of consideration and or whether time was of the essence are irrelevant to this court's consideration in determining whether SSM is entitled to exercise its contractual right to a refund under cl 25.3(b)(i) of the ERP agreement.

[229] There is no suggestion by Liberty that SSM's claim for the refund of all monies paid to Liberty under cl 25.3(b)(i) of the ERP agreement was not contractually agreed upon as a consequence of a lawful termination of the ERP agreement.

[230] Learned counsel for SSM took pain to emphasise that it is not SSM's case that there was in this case a total failure of consideration. On the contrary, SSM is relying strictly on its contractual rights under cl 25.3(b).

[231] As regards the 'inconsistency' between paras (b) and (e) of its notice of termination, it is SSM's position that it had in fact made the election to seek the refund and for Liberty to remove all its works on the ERP Solution from its premises at the commencement of this action. SSM further contended that in any event, it is entitled to make such an election at this stage after trial and during submissions.

[232] There is therefore no question of any unjust enrichment derived by SSM in seeking for the refund.

[233] In any case, the Federal Court in *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464 held that '... [t]here is a total

failure of consideration (and a failure to perform a promise in its entirety) where a reasonable and commercially sensible man would look upon the project of having little or no value at all'.

[234] In this regard, in the present case, DW1's evidence on the project is that in its current state, the project was obsolete and of no value to SSM whatsoever. This evidence went completely unchallenged by Liberty's counsel despite having every opportunity to do so during cross-examination.

[235] The relevant portions of DW1's evidence is reproduced as follows:

> Q: *Please refer to Question & Answer No 28 of your witness statement. Post-termination of the Enterprise Resource System ('ERP') Agreement dated 13.9.2017, what is the present status of the ERP System now?*
>
> A: The system was never tested and accepted by SSM under the terms of the ERP Agreement, and therefore it remained incomplete. SSM had continued to use its previous human resources and financial systems for the carrying out of its day-to-day functions.
>
> Q: *Please explain why did you describe the ERP System to be incomplete?*
>
> A: As I have explained at Question & Answer No 24 of my witness statement, LTRSB had not delivered a suitable ERP System by the time of the fourth Extended Completion Date, ie 31.8.2019.
>
> LTRSB had also failed to comply with the terms of SSM's Notice of Default, which requires LTRSB to 'meremedi kegagalan tersebut dalam tempoh tiga pulu (30) hari dari tarikh suart ini' by 19.12.2019 (CBOD Volume 35, pages 8290–8294/PDF pages 152–156).
>
> Following the termination of the ERP Agreement, the ERP System remains incomplete and not accepted by SSM. Further, I add that it is not even possible for SSM's users to log into the ERP System, much less use the ERP System in any manner whatsoever. (Emphasis added.)

[236] The unchallenged evidence of DW1 in this regard puts the question of consideration beyond question — SSM has no use for an incomplete ERP System which cannot be operated, accessed or utilised in any way whatsoever. That being the case, it does not lie in Liberty's mouth to contend that there had been no total failure of consideration.

[237] Learned counsel for Liberty further contended that the cl 25.3(b) allowing a refund is unconscionable and oppressive. He referred to the Federal Court's judgment in *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15, where the Federal Court stated that 'a court of law has always maintained a supervisory jurisdiction to relieve against a damages clause which is so unconscionable or oppressive ...'.

[238] Whilst that is a principle of law that must be correct, there is nothing in the present case that would make it unconscionable or oppressive for this court to compel the parties to adhere to what they had contractually agreed. Although Liberty contended that it had substantially performed the ERP System, namely, completed 88% of the works, the fact remains that what is 'completed' todate is of no value to SSM.

[239] As regards the contention that time is not of the essence, the totality of Liberty's contention appears to suggest that parties did not intend for time to be of the essence under the ERP agreement (despite the fact that it is expressly provided for under cl 19.2) on the basis that there is:

(a) an extension of time or EOT mechanism under cl 6.2 and 6.3 of the ERP agreement; and

(b) a liquidated ascertained damages or LAD mechanism under cl 20 of the ERP agreement.

[240] It is trite law that the *raison d'etre* of an EOT clause is precisely designed to prevent time from being rendered at large and, consequently, losing its essential character. An EOT clause is primarily employed to manage a situation where an employer had committed acts of prevention which delayed the completion of the works. An EOT would then prevent time for completion from being set at large and thus preserves the employer's entitlement to LAD. This does not in any way detract from the parties' agreement that time is of the essence such that a contractor's delays would result in more severe consequences.

[241] In the same vein of logic, an owner's/employer's right to terminate an agreement where time is of the essence is not inconsistent with the accompanying right to recover LAD up to the time of the termination of the contract

[242] The Court of Appeal in *Yuk Tung Construction Sdn Bhd v Daya CMT Sdn Bhd and another appeal* [2020] MLJU 1084; [2020] 1 LNS 1314 succinctly captures these points as follows:

> [56] If one considers the historical context, it was the 'prevention principle' which led to the incorporation of extension of time clauses in construction contracts (see *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744 ('Cyden Homes")). The UK Court of Appeal in *Cyden Homes* noted that such clauses were not 'designed to provide the contractor for excuses for delay but rather to protect the employer by retaining their right both to a fixed (albeit extended) completion date and to deduct liquidated damages for any delay beyond that extended completion date' (per Coulson LJ).
>
> [57] This was so as the extension of time clauses would already include the 'acts of

prevention' to extend time so that liquidated damages could only be claimed for the period after the extended completion date. So, as seen in *Multiplex*, acts of prevention by an employer do not set time at large if the contract provides for extension of time in respect of those events. It follows, therefore, that a lot depends on what particular acts of prevention are stipulated in the contract which would in turn generate consideration of any entitlement to extension of time.

[58] We would pause to observe that cl 43 of the CPS in the present case covers quite extensively relevant events to be considered for extension of time of the completion date. The fact that there were various applications for extension of time which came to be considered, as discussed earlier, lends credence to this observation.

[243] Notably, the Court of Appeal in *Yuk Tung Construction* expressly observed that the fact 'that there were various applications for extension of time ... lends credence to this observation'.

[244] In this regard, Liberty's contention that 'a total of 3 extensions of time were granted by SSM for Liberty to complete the ERP project' serves only to reinforce the position that parties had always intended for time to remain of the essence.

[245] Accordingly, I respectfully reject the contention that time was not of the essence in the ERP agreement.

[246] In relation to SSM's counterclaim for LAD in the amount of SSM RM1,966,812.94, cll 20.1 and 20.2 of the ERP agreement provide as follows:

20. DELAY AND LIQUIDATED DAMAGES

20.1. Liquidated Ascertained Damages

(a) *If LTRSB delays or fails to complete the project by the dates specified in Schedule C or any extended date agreed upon by the Parties* and save where such delay or failure is due to any act or omission of SSM, its servants and/or agents*, LTRSB shall pay liquidated ascertained damages ('LAD') to SSM for each day of the delay*.

...

20.2 Amount

(a) Subject to Clause 20.1, if due to LTRSB's sole act, failure, omission and/or negligence, LTRSB fails to deliver or perform any part of or all of the Works within the Contract Period, SSM shall have the rights to impose LAD for each day of the delay until actual delivery or performance of the Works by LTRSB. The liquidated damages shall be calculated as follows:

[((BR +1.5 %) x Contract Price)/365] x Numbers of Days Delayed

(b) BR (Base Rates) shall follow the current rate that is the lowest set amongst the banking and financial institutions.

(c) The Parties hereby unconditionally and irrevocably acknowledge that the sum stipulated herein constitutes a reasonable compensation.'

[247] At the time when SSM issued its notice of termination on 23 December 2019, the base rate was fixed at 3.0%. Applying the formula outlined in cl 20.2(a), the amount of LAD payable to SSM is as follows:

[((3 + 1.5%) x RM35,530,152/365days)] X 153 days = *RM670,205.74*

[248] Additionally, Liberty had expressly agreed with SSM under cl 2.2(c) of SA No 3 and cl 2.3 of SA No 4 that it would pay LAD to SSM if it failed to complete the ERP System by the third extended completion date of 31 March 2019 and the fourth extended completion date of 31 August 2019 respectively as follows:

(a) SA No 3 (1 October 2018-31 March 2019) = *RM797,238.21* and

(b) SA No 4 (1 April 2019- 31 August 2019) = *RM499,368.99*. Therefore, the total LAD claimed by SSM amounts to RM1,966,812.94.

[249] SSM contended that it has demonstrated breaches of the ERP agreement on Liberty's part and based on cll 20.1(a) and 20.2 of the ERP agreement and based on cl 2.2(c) of SA No 3 and cl 2.3 of SA No 4, all of which specify that 'a sum to be paid upon breach', SSM, being the innocent party, 'is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven'.

[250] Liberty is not disputing that SSM is entitled to the sum of RM670,205.73 as LAD (subject to the challenge as to the cause of delay which is to be dealt with below) but maintained that no LAD is payable for the said sum of RM797,238.21 and RM499,368.99.

[251] Whilst it is not disputed that the third supplemental agreement provides for such a LAD clause, and SSM is seeking the sum of RM797,238.21 under the same, Liberty argued that SSM had effectively waived its rights to the LAD through its own letter dated 26 November 2018.

[252] In Liberty's letter dated 30 August 2018, Liberty had requested for second extension of time to complete the ERP project. Particular attention must be paid to the last paragraph of this letter which is reproduced as follows:

We appeal that this request for extension does not subject LTRSB to Liquidated Ascertained Damages (LAD) mentioned in the contract. We are positively

confident that the extension period will give us sufficient time to complete the remaining project activities.

We look forward to a favourable consideration of our application from SSM.

Thank you.

[253] In response to Liberty's aforesaid letter dated 30 August 2018, SSM vide its letter dated 26 November 2018 acceded to Liberty's request for second extension of time, and further acceded that LAD will only be imposed against Liberty starting from the period of the third extension of time.

Tuan,

PELANJUTAN TEMPON MASA (EXTENSION OF TIME) KALI KEDUA BAGI PERKHIDMATAN 'SUPPLY, IMPLEMENTATION, TRAINING, SUPPORT, WARRANTY AND MAINTENANCE OF ENTERPRISE RESOURCE PLANNING (ERP)

Surat tuan bertarikh 30 0gos 2018 berhubung perkara di atas adalah dirujuk.

2. Dimaklumkan bahawa Suruhanjaya Syarikat Malaysia ('SSM') bersetuju untuk memberikan pelanjutan tempoh masa (*extension of time*) kepada Liberty Technology Resources Sdn. Bhd. (LTRSB) bag perkhidmatan in tertakluk perkara-perkara berikut:

(a) Pelanjutan tempoh masa kali kedua ditetapkan bermula pada 1 Oktober 2018 sehingga 31 Mac 2019 (Tempoh Pelaksanaan Projek) dan ia tidak akan melibatkan pertambahan kos kepada SSM (rujuk Jadual 1). Sekiranya pelaksanaan projek gagal diselesaikan sepenuhnya pada 31 Mac 2019 (Project Completion Date), SSM berhak untuk mengenakan Liquidated Ascertained Damages (LAD) kepada LTRSB bermula daripada tarikh pelanjutan tempoh masa kali ketiga:

[254] As regard the LAD sum of RM499,368.99 for the period between 1 September 2019 and SSM's notice of termination dated 23 December 2019, Liberty contended that there is no specified agreed term for LAD for the said period. In other words, SSM's entitlement to LAD for the period between 1 September 2019 and 23 December 2019 has no contractual basis.

[255] Firstly, the plain and obvious language above in the 26 November 2018 letter simply stipulates that SSM is entitled to impose LAD from the third extended completion date (ie from 1 April 2019 onwards) if the project is not completed by 31 March 2019.

[256] It says absolutely nothing about SSM foregoing, waiving or relinquishing its rights to recover LAD already accrued between 1 October 2018 to 31 March 2018 under SA No 3.

[257] Furthermore, it is an express term of the ERP agreement under cl 27 that:

> 27. WAIVER Failure or neglect by either Party to enforce at any time any of the provisions hereof shall not be construed nor deemed to be a waiver of the Party's rights hereunder nor in any way affect the validity of the whole or any part of this Agreement nor prejudice the Party's rights to take subsequent actions.

[258] Accordingly, there is simply no merit to Liberty's contention that SSM has waived its right to recover the RM797,238.21 accrued between 1 October 2018 to 31 March 2019 under SA No 3.

[259] As regards the LAD for the period from 1 September 2019 and 23 December 2019 for the sum of RM499,368.99, learned counsel for SSM has clarified that the stated period in paragraph 96 of SSM's Defence And Counterclaim was a typographical error.

[260] The correct period for the LAD amounting to RM499,368.99 accruing under SA No 4 ought to be 1 April 2019 to 31 August 2019.

[261] I agree with learned counsel for SSM that Liberty has not been prejudiced in any way by the typographical error.

[262] In fact, Liberty has always been made aware that the correct computation period of LAD under SA No 4 was always from 1 April 2019 to 31 August 2019 by virtue of the following:

(a) cl 2.3(a) 62 of SA No 4 itself clearly prescribes that the computation of LAD shall be from '1 April 2019 until 31 August 2019'; and

(b) Q&A No 30 of DW1's witness statement clearly provides that the computation of the RM499,368.99 is 'from 1 April 2019 to 31 August 2019'.

[263] There is no legal authority put forward by Liberty to support its contention that SSM can only recover LAD or a refund, but not both.

[264] An entitlement to LAD is meant to cover the loss and damage that an innocent party would suffer as the result of delays to the completion of the project. The subject loss and damage recoverable as LAD is distinct and separate from the payments to be reimbursed to an employer under a contractual mechanism. The latter is strictly not loss or damage in law but a reimbursement or restitution in an agreed recognition of the employer having received nothing of value for the payments made. It is obvious that an employer

would have suffered separate and distinct loss and damage for any delay to the project prior to its termination.

[265] Liberty has cited the High Court decision of *Ng Weng Sum v Lembah Beringin Sdn Bhd* [2002] 7 MLJ 211 to contend that no LAD should be granted if a refund is ordered. However, learned judge in *Ng Weng Sum* failed to give any reason or explanation as to why it dismissed the plaintiff's claim for liquidated damages therein. The entirety of what the learned judge said on liquidated damages is as follows:

> Under the said agreement, the plaintiff was given option either to terminate the agreement if the defendant failed to deliver vacant possession or to wait till a later date and then claim liquidated damages for late delivery from the defendant ... (3) The plaintiff's claim for liquidated damages was however rejected.

[266] The High Court in *Diong Tieow Hong & Anor v Amalan Tepat Sdn Bhd* [2008] 3 MLJ 411 had refused to follow *Ng Weng Sum*, where Justice Abdul Malik Ishak (as His Lordship then was) opined as follows:

> [26] It is my judgment that the case of *Ng Weng Sum* can be distinguished on the facts and that case should not be followed for the following reasons:
>
> (a) in *Ng Weng Sum*'s case, the property in question was 'a two storey shop/office' and not a condominium like our instant case at hand.
>
> (b) the SPA for the sale of a shop or office is not governed or regulated by the Housing Developers (Control and Licensing) Act 1966 unlike the sale of a residential condominium.
>
> (c) the learned judge in *Ng Weng Sum*'s case did not give any reasons at all as to why the purchaser's claim for LAD there is rejected. All that the learned judge said was that (see p 215 at para 'F'):
>
> The plaintiff's claim for liquidated damages was however rejected.
>
> (d) in short, the judgment on the issue of LAD in *Ng Weng Sum*'s case was nothing more than a *mere ipse dixit.*
>
> (e) in sharp contrast, there is an authority directly on the point where the court allowed the purchaser's claim for LAD after terminating the SPA for the delay in delivering vacant possession of the property. And that authority would be the case of Kang Yoon Mook Xavier v Insun Development Sdn Bhd.

[267] For the same reasons, I too, with respect to the learned judge in *Ng Weng Sum*, am not inclined to follow the decision.

CONCLUSION

[268] In the premises, the plaintiff's claims are hereby dismissed. The court makes the following orders in respect of the defendant's counterclaim:

(a) a declaration that that the ERP agreement is lawfully terminated;

(b) the plaintiff to pay the defendant the sum of RM12,228,365.80 being the refund of all sums paid by SSM to Liberty under the ERP agreement up to the time of the termination;

(c) the plaintiff to pay the defendant the sum of RM1,966,812.94 being the total LAD claimed by SSM;

(d) interest at the rate of 5%pa on the said sums of RM12,228,365.80 and RM1,966,812.94 from the date of the writ until full payments; and

(e) costs fixed at RM200,000 subject to payment of allocator.

Claim dismissed.

Reported by Ahmad Ismail